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COGS OR CYBORGS?: BLASPHEMY AND IRONY IN CONTRACT THEORIES

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Professor Grant Gilmore described contract as theory "dedicated to the proposition that, ideally, no one should be liable to anyone for anything."[1] In his introduction to *The Death of Contract*, Gilmore agreed with those scholars who had pronounced the creature dead,[2] but rejected their conclusion that contract theory is no longer worthy of attention. He wrote:

> In plotting our course, the best we have to go by is some knowledge of where we have come from. The most lovingly detailed knowledge of the present state of things begins to become useful to us only when we are in a position to compare it with what we know about what was going on last year and the year before that and so on back through the floating mists of time.[3]

Gilmore's stated purpose in writing *The Death of Contract* was to examine the past as a guide to the future. The book offers an analysis of where we are and have been as a tool for understanding where we may go.

In brief, *The Death of Contract* presents contract as a theory of life developed by and for a particular kind of being—a nineteenth-century individualist of the Oliver Wendell Holmes variety—and explains the passing of contract as the inevitable consequence of a change in the world's inhabitants.[4] Contract has died, according to Gilmore, because individualists have died. People now are interdependent cogs. We cogs, according to Gilmore, seek relationships and

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* Professor of Law, St. Mary's University School of Law. For many engaging conversations about contract, I am grateful to the contract law teachers in the informal Contracts Teaching Committee of the American Association of Law Schools, Section on Women in Legal Education. I am grateful to Carolyn DiPalma for helping me understand Donna Haraway, and to Ron Collins and Janice Weir for generous comments and conversation regarding this Article. Although Deborah Waire Post and Sharon K. Hom would disagree with much of this Article, it is rooted in our three year conversation about contract law and in the set of course materials that we are co-editing, CONTRACTING LAW: A SET OF COURSE MATERIALS (forthcoming 1996), and I am deeply grateful to them.

1 GRANT GILMORE, THE DEATH OF CONTRACT 15 (Ronald K.L. Collins ed., 2d ed. 1995).

2 *Id.* at 1, 113-14 n.1. Professor Gilmore named Professor Stuart Macaulay as "Lord High Executioner of the Contract is Dead school." *Id.* at 113-14 n.1.

3 *Id.* at 2.

4 *See id.* at 103-04. This account of Gilmore's thesis is discussed at greater length *infra* notes 45-50 and accompanying text.

perceive obligations very differently from our atomistic ancestors and thus we develop very different law. Gilmore predicts, then, that contract law will reflect norms of interdependence and will feature values of trust, reliance, and reciprocity.

The Death of Contract has failed in its declared purpose. Its account of the life and power of contract has turned out to be a misleading guide to the future of contract law. Others would argue that this stated purpose was not Gilmore's real purpose, that he actually meant to provoke deeper analysis of contract theory, to lay groundwork for a more complete critique of the work of Oliver Wendell Holmes, or merely to amuse his colleagues, and that the book succeeded in these other goals. That may be so; and I do not wish to contest the contribution *The Death of Contract* has made. But I do want to focus on its failure as prediction. As Gilmore observed, "it is possible to learn as much from a failed experiment as from a successful one,"[5] and there is much to learn from the failure of *The Death of Contract.* In addition, Gilmore's predictions clearly invite play with world-inhabiting figures and their ethics, politics, and law, and he's right, it is fun to play.

The first section of this Article discusses two of the most notable predictive failures of *The Death of Contract*, regarding the doctrines of reliance and unjust enrichment, and suggests that these failures were caused by Gilmore's underestimation of the persistence of contract ideology. The second section features some contemporary contract theories, focusing especially on their understandings of the persistence and meaning of contract. This sampling will be necessarily incomplete, presented as a kind of conversation and offered to fill in some of the silence in Gilmore's analysis. The final section joins with Gilmore's play of world-inhabitants and suggests that it is better to imagine ourselves cyborgs rather than cogs, for cyborgs seek active and multiple connection, while cogs live mind- and spirit-deadening coexistence. In furtherance of this cyborgian search, this section points to two engaging lines of interdisciplinary work that offer direction for future contract theorizing.

I. On the Purported Birth of Interdependence: Blasphemy and the Reaffirmation of Contract

The Death of Contract sends forth a birth announcement:

> We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift, where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort.

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[5] *Id.* at 111.

. . . .

> . . . I have occasionally suggested to my students that a desirable reform in legal education would be to merge the first-year courses in Contracts and Torts into a single course which we would call Contorts. Perhaps the same suggestion would be a good one when the time comes for the third round of Restatements.[6]

For Gilmore, Contorts was the new field being formed by the reabsorption of contract into tort.[7] Two main components of Contorts were unjust enrichment, as it is transitionally stated in Section 86 of the *Restatement (Second) of Contracts*, and promissory estoppel, as it is firmly stated in Section 90. "Speaking descriptively," Gilmore concluded, "we might say that what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.' "[8] As contract rules dissolve, "the two fields . . . are gradually merging and becoming one."[9]

The birth announcement of Contorts was as exciting as a circus coming to town.[10] And the crowds roared. The 100 or so pages of *The Death of Contract* generated hundreds of pages of law journal book reviews[11] and commentary.[12] According to Anthony Waters, "*The Death of Contract* quickly became one of those books that everybody reads and nobody praises. . . . For the better part of ten years, the literature has been replete with references to that book, as have the conferences, the workshops and the academic small-talk."[13]

Many readers felt, moreover, that the book might be a kind of magic act, a put-on, designed for the joy of friendly deceit. In his re-

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6 *Id.* at 96-98.

7 *Id.* at 98. Gilmore noted that current tort law was much more expansive than the theory of tort from which contract was separated a hundred years ago. *Id.* at 95.

8 *Id.* at 95.

9 *Id.* at 96.

10 Among many reviews were Clare Dalton, *Book Review*, 24 AM. U. L. REV. 1372 (1975); Richard A. Epstein, *Book Review*, 20 AM. J. LEGAL HIST. 68 (1976); James R. Gordley, *Book Review*, 89 HARV. L. REV. 452 (1975); Robert W. Gordon, *Book Review*, 1974 WIS. L. REV. 1216; Morton J. Horwitz, *Book Review*, 42 U. CHI. L. REV. 787 (1975); Gary Milhollin, *More on the Death of Contract*, 24 CATH. U. L. REV. 29 (1974); S.F.C. Milsom, *A Pageant in Modern Dress*, 84 YALE L.J. 1585 (1975); Ralph J. Mooney, *The Rise and Fall of Classical Contract Law*, 55 OR. L. REV. 155 (1976); Charles Reitz, *Book Review*, 123 U. PA. L. REV. 697 (1975); Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975); Timothy J. Sullivan, *Book Review*, 17 WM. & MARY L. REV. 403 (1975); Arthur T. VonMehren, *Book Review*, 75 COLUM. L. REV. 1404 (1974); Anthony J. Waters, *Book Review*, 36 MD. L. REV. 270 (1976). For a complete listing of reviews of THE DEATH OF CONTRACT, see the Bibliography to GILMORE, *supra* note 1.

11 Richard Danzig even wrote a review of the reviews, Richard Danzig, *The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia*, 29 STAN. L. REV. 1125 (1977).

12 *See, e.g.*, Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1289-94 (1990); Robert Hillman, *The Crisis in Modern Contract Law*, 67 TEX. L. REV. 103, 113-18 (1988).

13 Anthony J. Waters, *For Grant Gilmore*, 42 MD. L. REV. 865, 869-70 (1983).

view, Richard Speidel wrote, "I confess to an instinctive feeling that he [Grant Gilmore] will be amused by all of the reviewers who take him so seriously."[14] And Anthony Waters later reported that Grant Gilmore said he was "absolutely astonished" by the response to *The Death of Contract*: "All this left Gilmore 'absolutely astonished.' Each time he told me so, he used precisely the same phrase."[15] Puzzled by Gilmore's rehearsal of this phrase in reference to *The Death of Contract*, Waters mentioned it to him:

> One day I summoned the courage to tell him that not only had he told me the same thing before, each time using the same phrase, but that—and this is what struck me most—he had, more than once, described Holmes's reaction to the reception of *The Common Law* in the same way, using that very same phrase. For once, I startled him.[16]

Why all the excitement? And why the feeling of being had, of being taken in? Was Gilmore posturing? Was he joking on his colleagues by suggesting that the law had moved even beyond the socialization of contract to its dissolution?[17] *The Death of Contract* appears to have not only the excitement of a circus but the politics of a "freak" show.[18] How are we to respond? Are we to celebrate the arrival of a new understanding of human connection, or are we to be repelled by the sight of "abnormal" human entanglement? Readers have been perplexed by the message of *The Death of Contract* and mislead by its vision of contract law.

A. Contorts Today

The foretold coming of Contorts has not occurred. It is not true today that any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed or that any benefit received by a defendant must be paid for unless it was clearly meant as a gift. It is more accurate to say that recovery based on reliance is more restricted today than it was in 1974 and that the traditional reluctance to impose liability for benefit received still dominates unjust enrichment doctrine.

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14 Speidel, *supra* note 10, at 1167.

15 Waters, *supra* note 13, at 870.

16 *Id.*

17 Grant Gilmore and Friedrich Kessler used the term "socialization of contract" in their highly-regarded casebook to refer to modern contract law. *See* FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS: CASES AND MATERIALS 1118 (2d ed. 1970). The phrase echos Pound's "socialization of law." ROSCOE POUND, JURISPRUDENCE 429-32 (1959) (quoting Jhering that the socialization of law reflects the increasing value placed on persons rather than property).

18 *See generally* ROBERT BOGAN, FREAK SHOW: PRESENTING HUMAN ODDITIES FOR AMUSEMENT AND PROFIT (1990); David A. Gerber, *Pornography or Entertainment: The Rise and Fall of the Freak Show*, 18 REV. IN AM. HIST. 15 (1990) (reviewing ROBERT BOGAN, FREAK SHOW: PRESENTING HUMAN ODDITIES FOR AMUSEMENT AND PROFIT).

First, courts have severely restricted recovery based on promissory estoppel. In New York, for example, in order to prevail on a promissory estoppel claim, a plaintiff must establish the following elements: (1) A clear and unambiguous promise by the defendant, upon which there was (2) reasonable and foreseeable reliance by the plaintiff, (3) such that the defendant's failure to perform will cause injury or, perhaps, "unconscionable" injury.[19] In addition, promissory estoppel claims are not permitted in employment situations, or at least not in at-will employment situations.[20] By my count, New York courts have issued only forty-five reported decisions addressing promissory estoppel claims, including claims in which promissory estoppel is asserted as a defense against enforcement of the statute of frauds; the claims were rejected in thirty-nine of the forty-five cases; in only two of the cases, appellate courts upheld judgments granted on the basis of promissory estoppel; in two others, summary judgments were reversed and the cases were remanded for trial on promissory estoppel and other claims; and in two cases, no decision was made on the promissory estoppel claims, with the case decided on other grounds.[21]

Courts in other jurisdictions have imposed similar restrictions. Many courts now limit the doctrine of detrimental reliance to situations in which there was a "clear and unambiguous" or a "clear and definite" promise upon which the reliance was placed.[22] This restriction has developed in the years since *The Death of Contract* was published. *Hoffman v. Red Owl Stores, Inc.*,[23] a case widely cited for its enforcement of Red Owl's "assurances" upon which the Hoffmans had relied, has been narrowly interpreted or simply rejected.[24] Simi-

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19 *See, e.g.*, Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 73 (2d Cir. 1989); Tutak v. Tutak, 758, 507 N.Y.S.2d 232 (1986); Ripples's of Clearview, Inc. v. Le Havre Assoc., 452 N.Y.S.2d 447, 449 (1982).

20 *See, e.g.*, Van Brunt v. Rauschenberg, 799 F. Supp. 1467 (S.D.N.Y. 1992); Dalton v. Union Bank of Switzerland, 520 N.Y.S.2d 764, 766 (1987).

21 Phuong Pham reports a similar tally for the years after 1981. *See* Phuong N. Pham, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263 (1994).

22 *See, e.g.*, Kolentus v. Avco Corp., 798 F.2d 949 (7th Cir. 1985); Hass v. Darigold Dairy Prods. Co., 751 F.2d 1096, 1100 (9th Cir. 1985); Jungmann v. St. Regis Paper Co., 682 F.2d 195 (8th Cir. 1982); Ernest Laks v. Coast Fed. Sav. & Loan Assoc., 131 Cal. Rptr. 836 (Cal. Ct. App. 1976); Vincent Di Vito, Inc. v. Vollmar Clay Prod. Co., 534 N.E.2d 575 (Ill. App. Ct. 1989). *But see* Rosnick v. Dinsmore, 457 N.W.2d 793 (Neb. 1990) (rejecting special "definiteness" requirement for promissory estoppel). *See generally* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

23 133 N.W.2d 267 (Wis. 1965).

24 *See, e.g.*, Major Mat v. Monsanto Co., 969 F.2d 579, 582 (7th Cir. 1992) (interpreting *Hoffman* to require proof that "the promise was one that the promisor reasonably should have expected would induce action or forbearance" and deciding that the statement "you can rest assured we will have an unending supply of remnants" made by an artificial turf supplier did not

larly, several jurisdictions have limited the application of promissory estoppel in employment contexts and in landlord-tenant transactions.[25] The idea that it is unreasonable to rely on a promise of one's employer or one's landlord clearly is not consistent with Gilmore's vision of Contorts and the protection of reliance and interdependence. This categorical denial is particularly troubling in cases where there are numerous other reasons, including ties of friendship and reciprocity, to justify the reliance.[26]

The doctrine of promise for benefit received also has not fulfilled Gilmore's predictions. Gilmore argued that unjust enrichment provides an "even more compelling case for protection" than promissory estoppel, and thus represents a significant blurring of the boundary between contract, tort, and other bases of liability.[27] It is true that the set of values associated with unjust enrichment, or restitution, has powerful appeal; but as Gilmore acknowledged, the law of restitution coexisted with classical contract theory in cases such as *Cotnam v. Wisdom*[28] and *Britton v. Turner*.[29] The mere relaxation of rules against recovery in restitution for a person who has breached her contract is hardly a major change in contract thinking. As Gilmore suggested, the more significant contest between unjust enrichment and contract is posed by the doctrine allowing enforcement of a promise made in recognition of a past benefit, incorporated in Section 86 of

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meet this requirement); State Bank of Standish v. Curry, 500 N.W.2d 104, 109 (Mich. 1993) (rejecting *Hoffman* in favor of a rule requiring that the promise be "clear and definite").

25 *See, e.g.*, Dickens v. Quincy College Corp., 615 N.E.2d 381, 386 (Ill. App. Ct. 1993) ("a too liberal application of promissory estoppel to employment situations can cause a significant impact on the concept of employment at will"); *see also* Goldstick v. ICM Realty, 788 F.2d 456 (7th Cir. 1986) ("[E]mployment at will . . . remains the dominant type of employment relationship in this country and would be seriously undermined if employees could use the doctrine of promissory estoppel. . . . Reliance is easily, perhaps too easily, shown in the employment context."). But is not the prevalence of reliance in employment relationships a reason to enforce promises rather than a reason not to enforce them?

26 In Van Brunt v. Rauschenberg, 799 F. Supp. 1467 (S.D.N.Y. 1992), for example, the plaintiff, William Van Brunt, had been a close personal friend of the defendant, the artist Robert Rauschenberg. Van Brunt alleged that Rauschenberg breached his promises to pay Van Brunt's living and business expenses and to give him various pieces of artwork from exhibits that the two had worked on together in exchange for Van Brunt's work in coordinating exhibitions and on other artistic and administrative projects. *Id.* at 1470. Van Brunt alleged breach of contract and promissory estoppel, among other claims. *Id.* Although the court allowed Van Brunt to file a new complaint alleging specific breach of contract claims, it would not allow the promissory estoppel claim because the relationship between the two men was an "employment" relationship: "While Van Brunt has alleged each element of promissory estoppel [including a clear and unambiguous promise and reasonable and foreseeable reliance], the claim is nevertheless dismissed. This is because New York does not recognize promissory estoppel as a valid cause of action when raised in the employment context." *Id.*

27 GILMORE, *supra* note 1, at 80.

28 104 S.W. 164 (Ark. 1907).

29 6 N.H. 481 (1834).

the *Restatement (Second) of Contracts*.[30] Gilmore noted that this provision is "[a] hesitant and cautious text . . . [that] no doubt reflects the uncertainties of the Reporter and his advisers."[31] He urged, nevertheless, that "[t]he principal thing is that *Restatement (Second)* gives overt recognition to an important principle whose existence *Restatement (First)* ignored and, by implication denied."[32] He predicted, moreover, that this principle would grow in significance: "By the time we get to Restatement (Third) it may well be that . . . § [86] will have flowered like Jack's bean-stalk in the same way that § 90 did between *Restatement (First)* and *Restatement (Second)*."[33]

This prediction has not proved true. Very few reported decisions since 1974 have even mentioned Section 86, and most of those references have been made only in passing, often in reference to contract actions barred by the statute of limitations. I have found only four reported decisions involving Section 86; in two, the courts found that Section 86 would not support enforcement of the promise. Moreover, the two cases holding that Section 86 might support enforcement of the promise involve situations that fit a traditional quasi-contract model—one involved service rendered by a broker and another care provided by a sister. These cases do not represent movement toward the idea that "to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift" as Gilmore suggested.[34]

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30 *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 (Promise for Benefit Received):

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
(2) A promise is not binding under Subsection (1)
  (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
  (b) to the extent that its value is disproportionate to the benefit.

Gilmore's discussion refers to § 89A of the Tentative Draft, No. 2 (1965), the wording of which was identical to the final § 86. *See* GILMORE, *supra* note 1, at 132 n.163; RESTATEMENT (SECOND) OF CONTRACTS § 89A (Tentative Draft No. 2, 1965).

31 GILMORE, *supra* note 1, at 81-82.

32 *Id.* at 84.

33 *Id.*

34 *See* Realty Assocs. v. Valley Nat'l Bank of Ariz., 738 P.2d 1121 (Ariz. Ct. App. 1986) (finding that broker may recover on promise to pay for past services); McMurry v. Magnusson, 849 S.W.2d 619 (Mo. Ct. App. 1993) (holding that the jury should have been allowed to consider past services in connection with enforcement of an express promise to pay); *cf.* First Nat'l Bankshares v. Geisel, 853 F. Supp. 1344 (D. Kan. 1994) (holding that rule of § 86 does not apply to a promise to pay more than required by a prior contract); Starr v. Katz, 1994 WL 548209 (D.N.J. 1994) (concluding that litigant failed to provide sufficient evidence of past benefit or argument under § 86); Guaranty Bank v. National Surety Corp., 508 S.W.2d 928 (Tex. Ct. App. 1974) (holding that past consideration rule does not apply where the past benefit was part of another agreement).

In two recent articles, Professors Steve Thel and Edward Yorio have argued that most courts have treated promissory estoppel and past consideration doctrines as promise-based. In the most recent they observe:

Following some initial expansion, many courts have domesticated the doctrines of promissory estoppel and promise for benefit received, making them compatible with classical contract theory, or at least much less of a threat to it.[35] Most current versions of these doctrines offer little threat to the idea that no one should be liable for anything, at least not anything that she or he has not explicitly agreed to do. It seems that the pressures of contract ideology are so strong that, over time, they have reshaped the rebellious versions of these doctrines, fitting them into line with contract ideology. That means that lawyers and others troubled by the limitations and abuses of classical contract theory must have periodic bursts of new ideas. For this, we need generative theories.

The Death of Contract does not discuss the implied obligation of good faith or the doctrine of unconscionability, perhaps because these doctrines do not directly challenge the bargained-for consideration requirement of classical contract law. Yet they do suggest a basis for obligation between people other than narrowly interpreted promise or consent, and these doctrines often are cited as evidence of the coming together of contract and tort, as a part of Contorts. Their fate has been very similar to promissory estoppel and promise for benefit received. Most courts limit the doctrine of unconscionability so as to apply only to the time of formation of the contract, require that the contract be significantly more burdensome than other contracts of that sort, and require some evidence of procedural unfairness in the bargaining process.[36] The Uniform Commercial Code's suggestion that this doctrine foster analysis of "oppression" in contracting rela-

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Professor Grant Gilmore used Section 90 and the moral obligation cases as paradigms for his theory, presented in *The Death of Contract*, that contract law is being absorbed into a general theory of civil liability based primarily on tort-related concepts. In contrast, we argued in our earlier article that Section 90 promises are enforced even if the promisee does not suffer detrimental reliance. This finding supports the conclusion that in such cases courts enforce well-considered promises, rather than compensate for harm. Similarly, in this Article we argue that when courts enforce promises based on felt moral obligation, they are not compensating the promisee for harm that she would otherwise suffer, but instead are enforcing the serious commitments of promissors. The power of promise in this context shows that contract remains a vital theory of obligation distinct from the tort concept of compensation for harm.

Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1052 (1992) (citations omitted). *See also* Thel & Yorio, *supra* note 22.

35 I do not mean to suggest that promissory estoppel and unjust enrichment could never be a threat to individualist contract ideology; broad versions of these doctrines clearly have challenged contract thinking and continue to do so. *Cf.* Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 215 (1995) ("Promissory estoppel and unjust enrichment, broadly applied, could be quite subversive of an employer's power to control its employee benefit obligations").

36 *See generally* U.C.C. § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208; E. ALLAN FARNSWORTH, CONTRACTS 323-39 (2d ed. 1990). *But see* Lewis v. Lewis, 748 P.2d 1362, 1366-67 (Haw. 1988) (unconscionability applied to the time of performance of a pre-marital agreement).

tionships has been largely ignored.[37] Similarly, many courts have interpreted the doctrine of good faith narrowly; some have limited its application to contracts involving "special relationships"[38] and some have interpreted it to mean little more than honesty in fact and an absence of malice in the performance of contracts.[39]

So what is the law of Contorts today? Here is a general framework:[40]

1) In order to evoke the doctrines of promissory estoppel and promise for benefit received, it is necessary to prove that the defendant explicitly undertook the obligation. In addition, promissory estoppel often requires proof that the undertaking was made by a "clear and definite" or "clear and unambiguous" promise and that the promisor was not an employer, a landlord, or others in positions of power.

2) Under the doctrine of unconscionability, a contract cannot be more burdensome than most contracts of the same sort, judged at the time of the contract, unless the burdened party actually agreed to that arrangement or the arrangement was conspicuously described in a contract document. Generally, the doctrine of unconscionability will require more disclosure and greater fairness in relationships that are reciprocal and long-lasting, between people with roughly equal status, because courts will assume that parties in such relationships expect such behavior.

3) If the contract is long-lasting, or involves a relationship of trust, the parties generally owe an obligation of good faith to each other, which means some obligation of cooperation and the avoidance of opportunism. Generally, however, the obligation of good faith is not violated if a contract document allows the behavior in question. Many jurisdictions hold that at-will employment relationships do not include obligations of good faith, despite other evidence of trust or evidence that the employment has been or is expected to be long-lasting. In each of these areas, courts tend to equate obligation and reasonable expectation, and they tend to find expectations reasonable when the relationship is between people with relatively equal political and social status. This makes sense inasmuch as political and social status operates as a kind of social grid,

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37 U.C.C. § 2-302 cmt. 1 ("The principle is one of the prevention of oppression and unfair surprise"). In early commentary drafts, Llewellyn developed the notion of unfair surprise as critical to unconscionability. *See, e.g.*, Introductory Comments to Parts II and III, Formation and Construction 16-17 (1944), *in* THE KARL LLEWELLYN PAPERS J.VI.2.h (unpublished collection, available at the University of Chicago Law School Library). He was enthusiastic about this doctrine. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 291 (1973); *cf.* Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (asserting that Llewellyn was uneasy about § 2-302).

38 *See, e.g.*, Arnold v. Nat'l County Mutual Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987).

39 *See, e.g.*, Centronics Corp. v. Genicom Corp., 562 A.2d 187 (N.H. 1989); *see also* U.C.C. § 1-203.

40 Since each of these boundaries is contested, of course there are cases holding differently than this general map suggests. And the recognition of such "rebellious decisions" is crucial to contract law and theory. *See infra* notes 150-54 and accompanying text. The purpose of the boxed chart is merely to highlight a general framework into which these doctrines, and many cases decided under them, fall.

defining with whom one identifies and toward whom one feels sympathy and trust.

These doctrines form a sort of blueprint, a map of contractual obligation beyond the paradigmatic explicit exchange of promises; in box form, it looks like this:

	LONG-LASTING RELATIONSHIPS	DISCRETE EXCHANGES
PEOPLE WHO IDENTIFY WITH EACH OTHER BY STATUS ETC.	*E.g.*, partnerships, joint-ventures - reliance protected - disclosure required - implied obligations of good faith, cooperation, best efforts, and the like	*E.g.*, one-time purchases or services - reliance protected if significant and foreseeable - disclosure requirements often set by trade or community practice - some implied obligations of good faith
PEOPLE WHO DO NOT IDENTIFY WITH EACH OTHER	*E.g.*, employment, tenancy - reliance viewed as unreasonable or unprotected - disclosure required only to avoid deception - no meaningful implied obligations of good faith	*E.g.*, cross-class, cross-cultural, and cross-racial sales, sales in poor areas or neighborhoods of color - reliance viewed as unreasonable or unprotected - disclosure required only to avoid deception - no meaningful implied obligations of good faith

The length of connection between individual parties does influence the content of obligations and expectations between them, as relational contract theory suggests.[41] However, the degree of social identification or alienation apart from the contract affects the content of obligations and expectations even more significantly. As this chart suggests, social positioning is more significant to the content of expectations and obligations between people than length of relationship. This chart accurately reflects contracting practice in the late twentieth-century United States, in which relationships between people who identify and otherwise sympathize with each other through social positioning of class, race, and gender are often characterized by flexibility, cooperation, and norms of fairness, while relationships between people of different social power and position, who do not identify or sympathize with each other, are often exploitative and marked by the powerful party's disregard for the other. The wages of agricultural, homework, and non-unionized office and factory workers, for exam-

41 *See infra* notes 80-85 and accompanying text.

ple, are too low to support a healthy life and are a small fraction of salaries paid to corporate executives: some corporate officers in the United States are paid in a range of 3000 to 30,000 times the income of other employees.[42] As a result, the United States has the greatest inequality in wealth and income of all industrialized nations.[43] Excessive rents charged for apartments in low income areas, inflated prices charged by outside merchants doing business in neighborhoods of color, poor quality of medical and other services rendered to the poor[44]—these are instances of disregard, indifference, and exploitation by more powerful contracting parties. These contracts do not include expectations of reliance, reciprocity, good faith, or mutual concern. Social alienation precludes human connection. This pattern may be predictable in a society like ours, with our long history of domination of some groups by others through systems of race, sex, and class hierarchy, but surely it is cause for concern.

And this concern is not about the death of contract. In all of this, contract flourishes. Our concern is rather with justice, with the ways that contract can accompany oppression. How could Gilmore have thought that contract was dead? The answer, I think, is that Gilmore's analysis of contract gets lost in nostalgia and in the complicated politics of blasphemy. Although critical of the selfishness of Holmes's individualism, Gilmore also expresses nostalgia for an imagined past where individual freedom flourished. In the blasphemy of declaring contract dead, Gilmore invites his readers to embrace the value of contractual freedom without the need for further analysis. Moreover, by portraying contract as life-threatened, *The Death of Contract* conceals and therefore fails to analyze the persistence and politics of contract ideology. By feigning endorsement of a new human connectedness, the book argues for political and legal reactionism.

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[42] *See* John A. Byrne, *That Eye-Popping Executive Pay*, BUS. WK., Apr. 25, 1994, at 88 (reporting the 1993 income of $205,010,590 for Disney Chief Executive Officer Michael D. Eisner); Andrea Gerlin, *Spread of Illegal Home Sewing is Fueled by Immigrants*, WALL ST. J., Mar. 15, 1994, at B1 (noting that the Dallas-Fort Worth home-sewing industry has a full-time work force estimated at between 20,000 and 80,000 workers who are paid as little as 15 to 25 cents a piece, earning approximately $7000 a year); Pam Ginsbach, *Minimum Wage: Latest BLS Data Shows 4.1 Million Workers at or Below Minimum Wage*, DAILY LAB. REP., Mar. 13, 1995, at 48 (4.1 million workers in U.S. are paid at or below minimum hourly wage of $4.25).

[43] *See* Keith Bradsher, *Gap in Wealth in U.S. called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1 (noting that the inequality of wealth and income in the U.S. is the greatest of all industrialized nations).

[44] *See* Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 [hereinafter Austin, *A Nation of Thieves*] (citing numerous studies); Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Mark Green, *How Minorities Are Sold Short*, N.Y. TIMES, June 18, 1990, at A21; Kenneth Howe & Yumi Wilson, *Poverty Carries a High Price: Report reveals that poor pay more for goods and services*, S.F. CHRON., Oct. 6, 1993, at B1.

B. Gilmore's Analysis: Blasphemy and the Reaffirmation of Contract

To explain "what contract . . . was about in the first place and . . . what caused the fatal disease," Gilmore points first to the political, economic, and intellectual circumstances of the late nineteenth century. Suggesting a historical explanation for contract theory, he emphasizes the close resemblance between classical contract and laissez-faire economic theories:

> In both models, . . . "parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision." I suppose that laissez-faire economic theory comes down to something like this: If we all do exactly as we please, no doubt everything will work out for the best. Which does seem to be about the same thing that the contract theory comes down to . . . [T]he lawyers and the economists, both responding to the same stimuli, produced theoretical systems which were harmonious with each other and which, in both cases, evidently responded to the felt needs of the time.[45]

Next, Gilmore argues that changes in political and economic life during the twentieth century have affected people's views of both theories:

> *It seems apparent to the twentieth century mind, as perhaps it did not to the nineteenth century mind, that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful*, who are in a position to look after themselves and to act, so to say, as their own self-insurers. As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they implicitly assumed. No man is his brother's keeper; the race is to the swift; let the devil take the hindmost. *For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other.* The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.[46]

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45 GILMORE, *supra* note 1, at 103-04. A footnote to this passage notes that although Posner referred to the account of a connection between nineteenth-century restrictions on tort liability and nineteenth-century economic theories as "orthodox," this account was "novel" when expressed by Lawrence Friedman in 1965. Gilmore concedes, however, that the connection was becoming "commonplace" by the early 1970s.

46 GILMORE, *supra* note 1, at 104 (emphasis added). In addition, Gilmore offers some "more specifically legal" factors in the shape of contract theory and in its declining "hold on the legal imagination": first, the goal of national uniformity in the substantive law, which required "an intensive purification of doctrine . . . the one true rule of law, universal and unchanging, always and everywhere the same". . . "[t]o all of us, I dare say, the idea seems absurd. We are steeped in the idea that law is process, flux, change; our relativism admits no absolutes." But, "for a riot of pure doctrine, nothing could have been better than Contract. Since there had never been a general theory of contract before, there was nothing to inhibit the free play of the creative imagination." *Id.* at 104-07. A second factor was "an uneasy, inarticulate distrust of the role and function of the civil jury," *id.* at 108,—"avoidance of fact questions wherever possible as well as

This explanation of the life and death of contract is striking. First, it suggests that the mere perception that classical contract theory benefits the "rich and powerful" would undermine the influence of that theory. If this assumption were true, surely struggles for racial, gender, and class justice would not have been as difficult and bloody as they have been and continue to be, for racism, sexism, and class domination also benefit the rich and powerful. Surely Gilmore did not mean that merely seeing how contract theory benefits the rich and powerful is enough to dissuade modern minds.

Instead, his analysis rests on the purported changes in social and material circumstances: the shift from "nineteenth century individualism to the welfare state and beyond."[47] We are disenchanted with contract, he suggests, because we no longer live as individualists. Yet this explanation portrays interdependence, which Gilmore claims as the reality of modern life, in a very unattractive image: "For good or ill . . . [w]e are now all cogs in a machine."[48] Picture yourself as a "cog" in some machine—are you smiling? Picture Gilmore—is he? How are we to read this image? And what of the provocative remark, "[f]or good or ill,"[49] so casually thrown out?

By portraying life without contract as the life of a "cog," Gilmore encourages the reader to reclaim individualism and to view its alternative as inhuman and unnatural. Professor Donna Haraway observes that "blasphemy has always seemed to require taking things very seriously. . . . Blasphemy is not apostasy."[50] Gilmore's blasphemy in *The Death of Contract* requires taking "freedom of contract" and "individual autonomy"—the values proclaimed by classical contract theory—very seriously. Unfortunately, though, Gilmore does not use his blasphemy as a creative force. Instead, as in the passage just quoted, the image of life as a cog overshadows Gilmore's critique of contract. This image of life without contract is horrific. With this image, Gilmore affirms individualistic contract as normal and humane and shifts the readers' attention from the shortcomings of contract to the necessity of its preservation. In this shift, the power of Gilmore's critique of

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the restatement of questions of fact as questions of law through such devices as the reformulated doctrine of consideration and the newly minted objective theory of contract." *Id.* at 107. Now, "the civil jury is on its way out. . . . Since we no longer have to worry much about juries, we need no longer be as reluctant as once we were to allow trial courts—as triers of the facts—to inquire into such essentially factual questions as good faith, reasonableness, observance of commercial standards, change of circumstance, or, for that matter, fraud, duress and coercion." *Id.* at 109.

47 *Id.* at 104.

48 *Id.*

49 *Id.*

50 Donna J. Haraway, *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*, *in* SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 149 (1991) (originally published as *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the 80s*, 80 SOCIALIST 65 (1985)).

contract is lost. Having set up the opposition between contract as freedom and not-contract as cog-dom, Gilmore leaves no room for discussion of just and unjust contracting practices or alternative versions of contract theory. The only possibilities become contract as normal and free or not-contract as unnatural and confined. This is the politics of the "freak" show.

Although Gilmore argues for expansion of liability based on reliance and unjust enrichment, his arguments shock more than they persuade. And to shock with the unusual is to reaffirm the usual. This also is the politics of the "freak" show. If bearded ladies are exhibited as "freaks," then hairlessness will be seen not merely as common, but also as a mark of adequacy.[51] Without analysis of the persistence of contract ideology and with the tone of adoring blasphemy, *The Death of Contract* asserts the inevitability and thus the desirability of individualistic contract thinking, all the while abdicating responsibility for its consequences. Gilmore's account of the "death of contract" as the "death of freedom" is at once enthusiastic and resigned, even resentful. While some have seen Gilmore's announcement of the death of contract as wishful thinking,[52] this passage makes it appear much more like overreaction.[53]

II. Contract Theories, A Conversation

On one level, Gilmore's was a category failure. Because *The Death of Contract* equates "contract" with "classical contract theory," thought about human obligation that is inconsistent with classical contract theory must, by definition, be not-contract.[54] One common response to *The Death of Contract* has been to say that contract should be defined more broadly, as those obligations that arise as a consequence of choice or consent, which would include promises relied

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51 Thousands of women in the United States, disciplined by the rule of normalcy, do spend much time, money, and emotional energy concealing their facial hair. *See* Tami Gold, Juggling Gender (Videotape 1992) (available from Women Make Movies, Inc., New York, N.Y.) (portrait of Jennifer Miller, a bearded woman).

52 *See, e.g.*, Speidel, *supra* note 10, at 1166-67 (describing Gilmore's predictions as "gleeful" and observing that "[i]t is clear to me, at least, that Gilmore hopes the course for the future is to develop new synthesis rather than to attempt a reformulation of the law of contract along classical lines").

53 *The Death of Contract* is, in this way, reminiscent of Patrick S. Atiyah, The Rise and Fall of Freedom of Contract (1979). *See* Elizabeth Mensch, *Freedom of Contract as Ideology*, 33 Stan. L. Rev. 753, 767-72 (1981) (describing *The Rise and Fall of Freedom of Contract* as limited by Professor Atiyah's "nostalgia for the myth of past economic freedoms . . . and his identification with history's educated elite").

54 For an extended analysis of classification issues, see Jay M. Feinman, *The Jurisprudence of Classification*, 41 Stan. L. Rev. 661 (1989). Professor Feinman observes that the critical reaction to *The Death of Contract* "became a focal point for examining the nature of contract law and the process of doctrinal classification." *Id.* at 669.

upon and promises made in recognition of a past benefit.[55] This observation leads to the conclusion that *The Death of Contract* overemphasized the significance of the decline of bargained-for consideration. In addition, Gilmore's slippage from alternatives to bargained-for consideration (promissory estoppel and Section 86) to alternatives to choice or consent (cog-like) reveals both his failure to analyze the persistence of choice, consent, and individual autonomy as values among us and his failure to question the perceived correspondence between free market capitalism and freedom.

Philosopher Virginia Held writes of the pervasiveness of these ideas, which I will call contract ideology or "contract thinking." Although a distinction between ideology and theory would be misleading in many contexts, I will maintain a distinction here in order to separate ideology as a broad set of culturally located thoughts about and perceptions of human relations and theory as specific academic or legal projects that seek to understand, justify, or reorder thought and practice. Professor Held observes:

> Contemporary society is in the grips of contractual thinking. Realities are interpreted in contractual terms, and goals are formulated in terms of rational contracts. The leading current conceptions of rationality begin with the assumptions that human beings are independent, self-interested or mutually disinterested, individuals; they then typically argue that it is often rational for human beings to enter into contractual relationships with each other.[56]

Held argues that contract ideology is both descriptive and normative. People in contemporary society tend to see human relationships, both between individuals and among groups, in contractual terms. We learn to think of human society as based in contract: assumptions rooted in contract ideology "underlie the principles upon which most persons in contemporary Western society claim their most powerful institutions to be founded."[57] In the United States, "[w]e are told that modern democratic states rest on a social contract, that their economies should be thought of as a free market where producers and consumers, employers and employees make contractual agreements. And we should even, it is suggested, interpret our culture as a free market of ideas."[58]

On the prescriptive side, "leading theories of justice and equality such as those of Rawls, Noziak, and Dworkin, suggest what social arrangements should be like to more fully reflect the requirements of contractual rationality." On an individual level, "[t]he vast domain of

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55 *See, e.g.*, Speidel, *supra* note 10, at 1178-82.

56 Virginia Held, *Non-Contractual Society: A Feminist View*, 13 CANADIAN J. PHIL. 111, 111-12 (Supp. 1987).

57 *Id.* at 112.

58 *Id.*

rational choice theory, supposedly applicable to the whole range of human activity and experience, makes the same basic assumptions about individuals, contractual relations, and rationality," and prescribes human behavior that maximizes contractual freedom. In Held's view, the range of contract thinking is increasing, not decreasing: "contractual solutions are increasingly suggested for problems which arise in areas not hitherto thought of in contractual terms, such as in dealing with unruly patients in treatment contexts, in controlling inmates in prisons, and even in bringing up children."[59]

Professor Lawrence Friedman, upon whose work Grant Gilmore drew in explaining the decline of classical contract theory,[60] disagrees with Gilmore and other death-of-contract theorists, specifically Patrick Atiyah, about the decline in contract values: "One could argue the very opposite case: that is, the 'values involved in individual freedom of choice' have gotten more robust over the years."[61] In *The Republic of Choice*, Friedman argues that social and legal culture in the United States is rooted in the valuing of individual choice and that "the essence of contract *is* choice; contract means free and voluntary movements and arrangements, so that a social order based on contract is a social order which exalts the individual and his options above all else, a regime in which individual choice is the measure and legitimator of all things."[62] Friedman argues that it is a mistake to view government regulation and social support systems as a decline in contract thinking: "The problem arises if we equate business regulation or the apparatus of the welfare state with restrictions on choice. Regulations in one sense do restrict choice, but some of the innovations and restrictions have . . . quite the opposite feel."[63] Over all, Friedman concludes, "the classic ideas have retained enormous power."[64]

Regardless of its origins, contract ideology persists in the law in large part because it has a pervasive and persistent hold on the imaginations of many, particularly those professionals who most strongly influence public and legal discourse.[65] It involves, as Friedman describes, a cluster of widely and strongly held political and ethical values. And it includes, as Virginia Held observes, an epistemological aspect: contract ideology supplies the terms in and through which many perceive social reality. Professor William Klein demonstrated

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59 *Id.* at 112-13.

60 GILMORE, *supra* note 1, at 6-8.

61 LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 80-82 (1990).

62 *Id.* at 81.

63 *Id.*

64 *Id.* at 47.

65 *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 436 (1993) ("contract images and ideology exert a strong hold on the legal imaginations of the Justices").

the epistemological essence of contract ideology when he candidly remarked (in response to a discussion of alternative models for corporate organization): "I tend to think of all modern-day relationships, at least in a free society such as ours, in bargain terms."[66] The unexamined "tendency" to think of human relationships in contract terms is a central part of contract ideology.

Virginia Held deplores the persistence of contract ideology, arguing that it includes misleading assumptions about current social arrangements:

> As descriptions of reality [the assumptions of contract ideology] can be highly misleading. Actual societies are the results of war, exploitation, racism, and patriarchy far more than of social contracts. Economic and political realities are the outcomes of political strength triumphing over economic weakness more than of a free market. And rather than a free market of ideas, we have a culture in which the loudspeakers that are the mass media drown out the soft voices of free expression.[67]

Moreover, "[a]s expressions of normative concern . . . contractual theories hold out an impoverished view of human aspiration,"[68] and they are seriously incomplete: "[c]ontractual society is society perpetually in danger of breaking down."[69] Contractual relations are not sufficient to maintain social life: "what are needed for even adequate levels of social cohesion are persons tied together by relations of concern and caring and empathy and trust rather than merely by contracts it may be in their interests to disregard."[70] The system of contract itself depends upon other kinds of human connection: "[a]ny enforcement mechanisms put in place to keep persons to their contracts will be as subject to disintegration as the contracts themselves; at some point contracts must be embedded in social relations that are noncontractual."[71]

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66 William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1525 n.15 (1982) (questioning business association theories that use concepts of role and status, such as JAMES S. COLEMAN, POWER AND THE STRUCTURE OF SOCIETY 13-31 (1974)). Under this totalizing view, even government regulation and "the apparatus of the welfare state" are made compatible with a regime of contract. *See* FRIEDMAN, *supra* note 61, at 81.

67 Held, *supra* note 46, at 113.

68 *Id.*

69 *Id.* at 124-25.

70 *Id.* at 125.

71 *Id.* Held's view, which is shared by scholars such as Carole Pateman, Annette Baier, and Carol Rose, is that the social bonds of exchange among self-interested individuals are inherently unstable. *See* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (arguing that social contract theorists have assumed women's subordination as a necessary part of social order); Annette Baier, *Trust and Anti-Trust*, 96 ETHICS 231, 241 (1986) ("it takes an adult to be able to make a contract, and it takes something like Hegel's civil society of near equals to find a use for contracts"); Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992) (arguing that exchange depends upon trust).

Friedman, in contrast, defends contract ideology and the cluster of values associated with it as supportive of individual freedom and growth, nurturing human agency and excellence: "Despite vast changes in the world, the classic ideas [of choice, consent, and contract] have retained enormous power. . . . Choice and its passive form, consent, remain part of the *inner* definition of freedom, the subjective definition; they describe what it means to be a responsible human being."[72]

Among the most ardent defenders of contract ideology is Professor Randy Barnett, chief proponent of one version of neoclassical contract theory.[73] In vivid metaphor, Barnett argues that contract is crucial to human survival:

> Suppose you are on a commercial airplane that is flying at 35,000 feet. Next to you sits a man who appears to be sleeping. In fact, this man has been drugged and put upon the plane without his knowledge or consent. He has never flown on a plane before and, indeed, has no idea what an airplane is. Suddenly the man awakes and looks around him. Terrified by the alien environment in which he finds himself, he searches for a door or window from which to make an escape. As luck would have it, he is seated right next to a window exit and he begins to pull the handle that will open the window.[1] You are aware that opening the window exit at this altitude will cause the cabin to quickly depressurize and that this man, you, and probably several other passengers will be sucked out the window to your deaths. You desperately want to stop him from opening the window. Now assume that for some reason it is impossible to prevent him physically from performing the deadly act. Your only option is to rationally persuade him to leave the window exit alone. You cry out to him and, with both hands on the handles, he turns to face you and waits to hear what you have to say. What sort of argument would you make?[74]

With this scene of urgency set, Barnett undertakes a functional defense of freedom of contract, first defining two components of freedom of contract—freedom to contract and freedom from contract—and then arguing that each of these components addresses important social problems of knowledge, interest, and power. Before reading a summary of Barnett's arguments, however, you may want to know, as I did, who was the poor soul in the airplane, the drugged and unworldly one? The feeling of waking up terrified in an alien environment is one to which I could relate, but I wondered who Barnett had

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72 FRIEDMAN, *supra* note 61, at 80.

73 *See generally* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

74 Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL'Y 62 (1992).

in mind.[75] As best I can discern, the poor soul represents "critics" of freedom of contract and private property.[76] You also may be interested to read Barnett's footnote 1, which notes that actually it is not possible to open an airplane window.[77] Considering the intransigence of systems of power in the United States and the enormous success of scapegoat strategies in maintaining those systems of power, footnote 1 is revealing.[78] By telling this story, Barnett at once targets critics of contract as unworldly, perhaps intoxicated, assailants of social life and reveals himself as setting up a false enemy with imaginary powers. It would be horrible indeed to be sucked out of an airplane window, but if Barnett knows this cannot happen, then why does he sound the alarm?

Barnett's argument, in brief, is that freedom to contract addresses the social problem of limited knowledge by permitting individual property holders to discern opportunities for improved allocations of resources in the form of profitable exchanges (because the owner herself can decide whether or not to sell, for example). Freedom from contract, Barnett contends, addresses the problem of limited knowledge by protecting owners' ability to make and carry out knowledgeable plans without fear of losing control of their resources (an owner can undertake a five-year improvement plan, for example, knowing that she will not be forced to sell the property before five years). In addition, freedom from contract enables market pricing as a system of information transmittal (which would be undermined by a system of price controls, for example). Restrictions on private property and freedom of contract will leave us without means to solve these problems of human coordination and thus will undermine human society. In as much as welfare systems entail restrictions on private property and freedom from contract, we need to do away with the safety net in order to prevent all of us from falling out of airplanes. This

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75 *See* Ann C. Scales, *Surviving Legal De-education: An Outsider's Guide*, 45 VT. L. REV. 139 (1990); *cf.* WORKING-CLASS WOMEN IN THE ACADEMY: LABORERS IN THE KNOWLEDGE FACTORY (Michelle M. Tokarczyk & Elizabeth A. Fay eds., 1993).

76 *See* Barnett, *supra* note 67, at 94.

77 "Although the pressurized cabin and the design of airplane exits would make this impossible, assume that he can open the window exit." *Id.* at 62 n.1.

78 The image is especially jarring when one recalls several airplane accidents during government deregulation of the airline industry by the Reagan-Bush Administrations, a consequence of policy inspired by freedom of contract arguments like Barnett's. One of these occurred on April 28, 1988. Clarabelle Lansing, a flight attendant for Aloha Airlines, was killed when the top panel of the airplane in which she was working broke off and she was pulled from the plane by the depressurizing burst. The poor condition of the airplane was blamed in part on deregulation and reduced enforcement of safety standards in the airplane industry during the Reagan-Bush Administration. This is hardly an argument for "freedom of contract" between airlines and their employees and passengers. *See* Steven Radwell, *U.S. Jetliner Incidents Renew Safety Debate*, REUTERS, Dec. 28, 1988; Stephen Koepp, *Special Report: Aircraft Safety; How Safe Is The U.S. Fleet?*, TIME, May 16, 1988, at 62.

absurd conclusion flows from a dubious assumption in neoclassical contract theory, the same assumption that Gilmore criticized in classical contract theory: that individuals are atomistic, unconnected except by bargain relationships, and therefore at risk of social dissolution in the ways Barnett suggests.

A gentler version of contract ideology is given by relational contract theorists. Beginning with an assumption of social connection, relational theorists are unconcerned with the risk of social dissolution that Barnett sees as central. Professor Ian Macneil describes contract as grounded in society:

> Contract without the common needs and tastes created only by society is inconceivable; contract between totally isolated, utility-maximizing individuals is not contract, but war; contract without language is impossible; and contract without social structure and stability is—quite literally—rationally unthinkable. . . . [T]he fundamental root, the base, of contract is society.[79]

In this view, the core of human life is social interaction and individuals are essentially interconnected. The core of contract is not competition, but cooperation. While specialization of labor entails differentiation among individuals' skills and material resources, it also requires cooperative exchange. Thus, specialization of labor, exchange, and choice are the "primal roots" of contract.[80] As Professor Jay Feinman argues:

> Any society in which specialization of labor exists will include exchange, and exchange always occurs in a relational context. In any society, even the most capitalistic, individualistic one, the production and distribution of goods and services are carried on through a variety of exchange mechanisms, of which discrete, self-maximizing exchange on a market (the paradigm of a neoclassical contract) will be a very small part. . . .[81]
>
> Relational contract [theory] . . . emphasizes the interdependence of individuals in social and economic relationships. . . . [it] focuses on the necessity and desirability of trust, mutual responsibility, and connection among people. Not all of these bonds should be legally enforceable, but beginning analysis by recognizing them is likely to produce a broader set of legal obligations.[82]

Thus, the practice of relational contract theory begins by describing types of relationship (the theory defines three types: a discrete transaction, a discrete transaction which takes place within a system of relationships, and a complex relation) and the norms relevant to each relational type:

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79 IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 1 (1980).

80 *Id.* at 2.

81 Feinman, *supra* note 12, at 1300-01.

82 Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 312 (1992).

> These norms include both norms generated internally by the parties and external social norms. The norms differ depending on the type of case under scrutiny. In a discrete transaction, for example, implementing planning and effectuating consent are particularly important, while contractual solidarity and flexibility are more important in an ongoing relation.[83]

Relationships are classified according to closeness, longevity, and complexity. The norms applicable to each type of relationship depend in large part on these factors. The next step in relational theorizing is to determine how these norms can be implemented through legal rules: "For example, while contractual solidarity may be important in preserving relations, in some situations to impose a legal standard of solidarity might create disharmony instead."[84]

Relational contract theory is valuable for a number of purposes. I will mention just two. First, relational contract theory is a powerful tool in tempering the excesses of the "freedom from contract" component of classical contract thinking.[85] Gilmore described this core notion of classical contract theory as "no one should be liable to anyone for anything."[86] Relational contract theory provides a strong basis upon which to argue that people in lasting, reciprocal relationships have a variety of obligations to each other, many of which are never explicitly stated by the parties. This has been the most widely recognized contribution of relational contract theory.[87]

Second, relational contract theory helps focus attention on power created by contractual relations and thus on its use and abuse. The making of a contract does create power between people. This is the element of contract reflected in the Republican Party's "Contract With America" advertisement originally published in the *T.V. Guide*:

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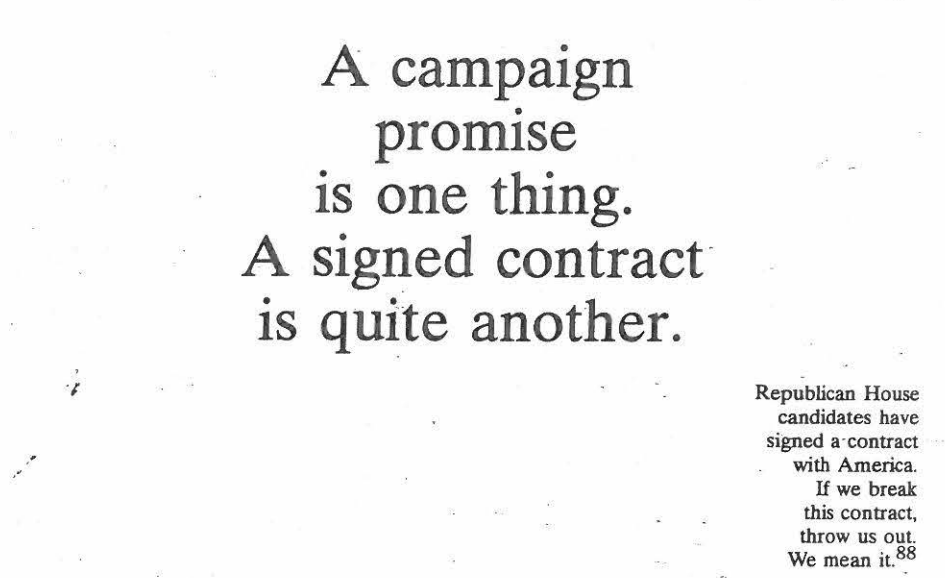
83 *Id.* at 313.

84 *Id.*

85 *Cf.* Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992).

86 *See supra* text accompanying note 1.

87 *See* Bill Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545 (observing that Macneil's ideas on contract presentation have been more widely accepted than his other ideas).



Sure Americans are suspicious of politicians, with good reason. But if you have a CONTRACT, then you can control the guy. He can't slip away like he could from a mere campaign promise.

The formation of a contract creates formal juridical power, in the ability of one party to call upon the power of the state to hold the other to her or his word. A contract also may create informal material power if one party becomes dependent on the other for needed goods or services. Finally, a contract may create informal political power, in the ability each party may have to criticize the other and to hold the other publicly accountable for a failure to fulfill her or his contractual commitments.

The powers created by contracts are sometimes abused, and it is important to name and to understand these powers in order to address instances of abuse. This is a task for contract theory. The doctrines of contract modification (the pre-existing duty rule and its variations and reformations) and economic duress have been much less useful than they could be because they have lacked a language and analysis of contractual power. Relational contract law offers the possibility of strengthening these doctrinal tools.

Relational theory is not helpful, however, in addressing the practices of exploitation, powerlessness, and marginalization that contract ideology justifies or conceals. In this observation, I draw on Professor Iris Young's elaboration of "five faces" of structural oppression:[89] exploitation, which refers to "a steady process of the transfer of the re-

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88 T.V. GUIDE, Oct. 22-28, 1994. I am grateful to Professor André Hampton for this reference.

89 IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 39-65 (1990).

sults of the labor of one social group to benefit another";[90] marginalization, in which groups of people are "expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination";[91] powerlessness, the position of those "over whom power is exercised without their exercising it"[92] and who therefore are prevented from developing their skills, creativity, and "sense of self";[93] cultural imperialism, which involves "the universalization of a dominant group's experience and culture"[94] such that "the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it as the Other";[95] and systematic violence, which includes acts of violence against members of a group and the social context that "makes them [the acts] possible and even acceptable."[96] These categories or criteria of oppression provide useful language about different kinds and dynamics of group oppression.[97] Although contract thinking is implicated in each of these forms of oppression, the first three—exploitation, marginalization, and powerlessness—are most directly involved in many contracting situations. Inasmuch as cultural imperialism involves a devaluing of the skills and products of white women and women and men of color, this is also implicated in contracting practices.

Jay Feinman suggests that relational theory does address issues of exploitation and powerlessness, but his claim is unconvincing. Comparing two cases in which insurance agents promised terms that were not finally included in the policies, Feinman argued that relational contract theory would treat "inequality of status" as relevant to the insurance companies' legal obligations.[98] In the first case, *Prudential Insurance Co. of America v. Clark*,[99] an insurance agent promised a Vietnam-bound Marine that his insurance policy would be issued without a war-risk exclusion, and the court enforced the promise. In

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90 *Id.* at 49.

91 *Id.* at 53.

92 *Id.* at 56.

93 *Id.* at 57.

94 *Id.* at 59.

95 *Id.* at 58-59.

96 *Id.* at 61.

97 As Professor Young notes, racism in the United States condemns many African-Americans and Hispanics to marginalization, for example, even though many members of these groups escape that form of oppression. Many African-Americans and Hispanics suffer exploitation and powerlessness, as do many white working-class women and men. Women are subject to gender-based violence, exploitation, cultural imperialism, and powerlessness. Gay men, by comparison, generally are not subject to exploitation as gay men, although they are subject to homophobic cultural imperialism and violence. *Id.* at 64.

98 Feinman, *supra* note 82, at 314.

99 456 F.2d 932 (5th Cir. 1972).

the second case, *Marker v. Preferred Fire Insurance Co.*,[100] an insurance agent promised to give notification of the expiration of a property insurance policy to the owner, Marker, who was himself an attorney and an insurance agent, and the court did not enforce the promise. Feinman begins by noting that "each case presents a somewhat discrete situation; in neither case is there an extensive relationship between the parties. Therefore, analysis should begin by focusing on the presence of planning and other indicia of consent."[101] Feinman continues:

> However, neither case is entirely discrete; each has some relational characteristics. In *Clark*, the significance of the relationship is *the expert role assumed by the agent relative to the insured, and the extent of the insurance company's power to control the terms of the formal contract* which is issued subsequent to the agent's representations about its contents. Both of these elements arise because the specific events occur within a complex, bureaucratic system for the sale of insurance. *These characteristics carry with them a heightened obligation.* In the final step of the process, note that the imposition of liability is likely to strengthen the relation; insurance companies will be more inclined to control their agent's sales talk, or suffer the consequences. In *Marker*, on the other hand, *the extent of the property purchaser's dependence on the agent is lower, because of the more equal status of the parties* and because of the purchaser's statements explicitly disclaiming the possibility of a long-term business relationship with the agent.[102]

Feinman does not explain why, within the terms of relational theory, an expert role and the power to control the terms of the formal contract "carry . . . a heightened obligation" and why the relative "status" of the parties (by which Feinman apparently means class) relates to the "extent" of "dependance." Feinman's claims seem to be wishful thinking. It is true that the "norms" identified by relational contract theory are both descriptive and normative: they both reflect expectations many people may have in similar relations and prescribe standards to which parties ought to conform in order to sustain the relation. But to say that relations between people of unequal power and status will be unstable unless the more powerful party assumes "a higher obligation" is to beg the question of why the parties or anyone else would expect relations between unequals to be stable? There is nothing in relational contract law that says transactions may not be discrete; by the same token, there is nothing in relational contract theory that says discrete transactions cannot be exploitative, marginalizing, or both.

According to many critical contract theorists, contract ideology persists because it is deeply entwined with regnant narratives of

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100 506 P.2d 1163 (Kan. 1973).

101 Feinman, *supra* note 82, at 314.

102 *Id.* (emphasis added).

human life and social hierarchy. As Professor Elizabeth Mensch observes, contract thinking makes "actual domination appear free, natural, and rational."[103] Professor Patricia Williams describes a connection between contract and domination: "Contract law reduces life to fairly tale. The four corners of the agreement become parent. Performance is the equivalent of passive obedience to the parent."[104] Comparing Judge Sorkow's decision enforcing the surrogacy contract in *Baby M*[105] with the contract of sale of her great-great-grandmother at the age of eleven, Williams observes:

> In both situations, the real mother had no say; her powerlessness was imposed by state law that made her and her child helpless in relation to the father. . . . The contract-reality in both instances was no less than magic: it was illusion transformed into not-illusion. Furthermore it masterfully disguised the brutality of enforced arrangements in which these women's autonomy, their flesh and their blood, was locked away in word vaults, without room to reconsider—ever.[106]

One reason for the persistence of contract thinking, then, is that it makes sense of the world in a reassuring way. If all human relations are matters of choice, then one can avoid harm by making good choices. And as Mensch suggests, this belief conceals actual injustice.[107]

Another theme in some critical contract theory, though, is that contract, as a set of thoughts and practices that affirm human agency and human freedom, can be life-enriching as well as life-threatening. Professor Regina Austin makes this argument regarding African-American street vendors:

> Street vending fills a small part of the void created by the economic marginalization of black Americans as workers, owners, and consumers.

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103 Mensch, *supra* note 50, at 767. *See also, e.g.,* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1113 (1985); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Mary Louise Fellows, *His to Give, His to Receive, Hers to Trust: A Response to Carol Rose*, 44 FLA. L. REV. 329 (1993); Mary Jo Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 ANN. SURV. AM. L. 223.

104 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 225 (1991).

105 *In re* Baby "M", 525 A.2d 1128 (N.J. Super. 1987), *aff'd in part and rev'd in part*, 537 A.2d 1227 (N.J. 1988).

106 WILLIAMS, *supra* note 104, at 225-26.

107 Professor Robert Gordon argues that contract law informs perceptions about the world, which in turn validate the underlying contract ideology:

> [T]he law embodies a set of fantasies about the world that become real when people act upon them as if they are real: when, for example people accept the terms of a deal imposed upon them by powerful others as the product of circumstances and their own volition rather than simply of the power of others . . . .

Robert W. Gordon, *Macauley, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578.

> Illegal, informal street vending employs people. It supplies blacks with goods they need and want. It contributes to the maintenance of black culture. It challenges nonblack businesses in black enclaves. It helps people gain the capital and know-how to operate businesses in the formal sector. Finally, it is the site of grassroots activity that could lead to new initiatives uniting the political and economic concerns of blacks.[108]

This view of exchange suggests a healing dimension of contract. Professor Marjorie Schultz argues in a similar vein that even though contract has contributed to their subordination, women can benefit from reclaiming some aspects of contract thinking:

> [W]e desperately need diversification, the respect for diversity, the respect for individualization, that is the good part of the ideology and reality of [contractual] ordering. While women have many, many things in common, they also have many differences from one another. And we simply cannot resolve the massive problems . . . [among us] without using some tool that gives effect to diverse, individual, private commitments, and decisions.[109]

In this way, core contract values of freedom and agency are linked with values of interdependence and mutual regard.

In both of these themes, critical contract theory invites examination of multiple power relations implicated in contract ideology. This is an invitation for lawyers to shift attention from the "truth value" of contract thinking to the social and political consequences of particular ideas.

Although Gilmore undertook to examine the history and politics of contract theory, his study was limited by his failure to analyze the continuing strength of contract ideology. Contemporary contract theorists have provided greater insight into this phenomena. Contemporary society is in the grips of contract thinking, yet as Gilmore suggested, contract creates or perpetuates injustice. How, then, should judges, lawyers, and law teachers think about the current state of contract law and theory? How can we help to make this area of law more just? In order to think about these questions, we need a better image of contemporary society and its members. Not cogs but cyborgs.

III. Cyborgian Contract Meta-Theory

While Gilmore undercuts the force of his blasphemy, historian Donna Haraway employs hers as a vehicle for creative political and

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108 Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 Yale L.J. 2119 (1994).

109 Presentation by Marjorie Schultz, *in* Mary Becker, et al., 1989 American Assoc. Law Schools' Annual Meeting, SALT Panel on The Idea of Justice: The Role of Legal Education (New Orleans, Louisiana Jan. 5-8, 1989) (audio tapes) (I am grateful to Professor Marjorie Schultz for making the tapes of this presentation available to me.).

theoretical movement. For her, blasphemy and irony are theoretical and political methodologies:

> Blasphemy has always seemed to require taking things very seriously. I know of no better stance to adopt from within the secular-religious, evangelical traditions of United States politics. . . . Blasphemy protects one from the moral majority within, while still insisting on the need for community. Blasphemy is not apostasy. Irony is about contradictions that do not resolve into larger wholes, even dialectically, about the tension of holding incompatible things together because both or all are necessary and true. Irony is about humor and serious play. It is also a rhetorical strategy and a political method. . . . At the center of my ironic faith, my blasphemy, is the image of the cyborg.[110]

A cyborg is "a cybernetic organism, a hybrid of machine and organism."[111] A cyborg is, in other words, an ironic and blasphemous woman, a woman of power, political influence, and sass.[112] Cyborgs are interconnected, but they are not cogs—far from it. With Professor Patricia Williams, cyborgs see law as rhetorical gesture, as momentary play of a most serious sort:

> That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these *as* rhetorical gestures is, it seems to me, necessary for any conception of justice. Such acknowledgment complicates the supposed purity of gender, race, voice, boundary; it allows us to acknowledge the utility of such categorizations for certain purposes and the necessity of their breakdown on other occasions.[113]

Unlike Allan Farnsworth, Robert Hillman, and others,[114] cyborgs do not call for the end of contract theorizing. Quite the contrary, cyborgs want more. They want a multitude of contract theories, a swarm of contract theories, feeding both from within and without law, a wired buzz of contract theories, disorderly, convincing, and ironic. Like Grant Gilmore, Carol Smart, and others, though, cyborgs avoid "grand theory."[115] Meta-theory is momentary, a thing you do for

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110 HARAWAY, *supra* note 50, at 149.

> A Cyborg is a cybernetic organism, a hybrid of machine and organism, a creature of social reality as well as a creature of fiction. Social reality is lived social relations, our most important political construction, a world-changing fiction. . . . The cyborg is a matter of fiction and lived experience that changes what counts as women's experience in the late twentieth century. This is a struggle over life and death, but the boundary between science fiction and social reality is an optical illusion.

Id.

111 *Id.*

112 Sass is, after all, the form of many women's blasphemy. *See, e.g.*, Sandra Cisneros, *Loose Woman*, *in* LOOSE WOMAN 112 (1994).

113 WILLIAMS, *supra* note 104, at 10.

114 E. Allan Farnsworth, *A Fable and A Quiz on Contracts*, 37 J. LEGAL EDUC. 206 (1987); Robert Hillman, *supra* note 12.

115 HARAWAY, *supra* note 50, at 181 ("Race, gender, and capital require a cyborg theory of wholes and parts. There is no drive in cyborgs to produce total theory, but there is an intimate

short periods of time, without lasting structure, while grand theory is the stuff that makes you think you can give up trying to understand.[116]

With Gilmore, Friedrich Kessler, and many others, cyborgs see contract as deeply conflicted and richly complex.[117] And they see contract theory as inevitably limited. "Cyborg writing is about the power to survive, not on the basis of original innocence, but on the basis of seizing the tools to mark the world that marked them as other."[118] Viewing legal rules as rhetorical gestures (in the philosophical sense of that term, as temporary renditions of indeterminate situations determinate for the purposes of action), cyborgs view theory as a process of discovery and as protection against the greatest danger of rhetoric: that people will think that temporary resolutions are permanently true. Cyborg thought is compelling—we do need more contract theories and should embrace them as contradictory.

There are two reasons why this is so. The first is strategic: we need a multitude of contract theories because contract ideology (particularly the individualistic strand featured in classical and neoclassical contract theory) is persistent, and alternative accounts of human connection, including serious versions of reliance, unjust enrichment, unconscionability, and good faith doctrine, are short-lived. Many people in the United States adhere to individualistic contract ideology nonconsciously, without considering it to be a distinctive set of thoughts

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experience of boundaries, their construction and deconstruction."). *See* GILMORE, *supra* note 1, at 111-12; CAROL SMART, FEMINISM AND THE POWER OF LAW 66-89 (1989); Martha A. Fineman, *Introduction* to AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY xi-xii (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); bell hooks, *Theory as Liberatory Practice,* 4 YALE J.L. & FEMINISM 1 (1991).

116 I am using the term "meta-theory" in its conventional sense as a theory about theory, but my understanding of the concept and the practice is shaped by Peggy Davis's analysis of "going meta." Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1636 (1991) ("In describing the social stance of stigmatized people, Erving Goffman refers to a tendency to "go meta"—to withdraw from fully focused participation in a social scene and to attend instead to the interactive dynamics of the scene.") (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 111 (1963)).

117 *See* KESSLER & GILMORE, *supra* note 17, at 2 ("In our modern society, a tension exists between those values favoring individual freedom and those favoring social control. . . . Small wonder, then, that modern contract law reproduces the same tension within itself, drawing much of its drama and vitality from our divided commitment to individual freedom and social control."); FRIEDRICH KESSLER & GRANT GILMORE, TEACHER'S MANUAL, CONTRACT CASES AND MATERIALS 4 (1972) ("In selecting these materials we have tried to resist the temptation of making it appear that everything fits together in a well-designed and neatly carpentered structure. The case law of the past half-century is notable for its chaotic richness and its unruly diversity."); *cf.* Dalton, *supra* note 103; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). While these writers see a conflict in contract between individual freedom and social control, others see quite different conflicts.

118 HARAWAY, *supra* note 50, at 175; *see also* CAROLYN G. HEILBRUN, HAMLET'S MOTHER AND OTHER WOMEN 103 (1990).

and perceptions, because it corresponds with their learned perceptions of life. Moreover, most do not have reason to question this ideology, because it generally serves their interests, at least as those interests are perceived through the lens of contract ideology.[119] It is unlikely that individualistic contract ideology will wither away, and it is predictable that serious challenges to it will be relatively short-lived. In Barnett's metaphor, it is not possible to open the airplane window, even if the airplane is on the ground and in need of ventilation. This is not to say that challenges to contract ideology are not worthwhile or their achievements insignificant. In fact, that is the whole point: if change cannot be long-lasting, then we should seek more of it. Temporary legal victories can bring moments of peace, places of safety and creation, experiences of human dignity, and occasions of justice.

Professor Derrick Bell has chronicled a similar phenomenon regarding civil rights in the United States, the history of which Bell describes as "a pattern of cyclical progress and cyclical regression."[120] Doctrinal and legislative innovations that challenge existing social and political arrangements seem to have remarkably short half-lives. The Civil Rights Acts of 1964,[121] for example, provided effective tools for numerous struggles against racial and gender subordination during the 1960s and 1970s. By the 1980s, however, courts had developed a set of interpretations and judicial restrictions that undermined the effectiveness of these statutes. The Civil Rights Amendments of 1991[122] can be seen as a kind of half-life extension, perhaps prolonging the utility of these provisions for a few more years. But soon, if not already, a new set of tools will be needed. The ideologies of white racism, patriarchy, heterosexism, class privilege, and ablism are strongly rooted in United States culture, and they continue to serve the interests of those who most powerfully influence public discourse. For many people, adherence to these ideologies is unexamined and unlikely to be ex-

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119 *Cf.* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635 n.3 (1983) ("[T]he perspective from the male standpoint is not always each man's opinion, although most men adhere to it, nonconsciously and without considering it a point of view, as much because it makes sense of their experience (the male experience) as because it is in their interest. It is rational for them. A few men reject it; they pay. Because it is the dominant point of view and defines rationality, women are pushed to see reality in its terms, although this denies their vantage point as women in that it contradicts (at least some of) their lived experience. . . . The intractability of maleness as a form of dominance suggests that social constructs, although they flow from human agency, can be less plastic than nature has proven to be.").

120 DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 98 (1992).

121 Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., and 42 U.S.C. (Supp. V 1993)).

122 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, and in scattered sections of 5 U.S.C. and 42 U.S.C. (1988 and Supp. V 1993)).

amined. Thus, the struggle for justice requires ongoing invention, constant innovation, in contract as elsewhere.

The second reason why we need a multitude of contract theories is substantive, related to the nature of contract ideology and law. As it exists and is maintained among us, contract is not conducive to monolithic theorizing because it is not one thing and does not stand in one position. To say that we employ different and conflicting theories, then, is not to admit failure of theory, but rather to recognize effective strategy. Professor Carol Smart makes a similar point regarding legal theory generally: "I have argued against the idea of a theory of law and the development of a totalizing theory. . . . The problem which then arises is whether, without such a general theory, it is ever possible to develop anything other that *ad hoc* tactics. Yet this is really a false problem. . . ."[123] It is a false problem, Smart explains, because by its nature, law is not conducive to grand theorizing or monolithic tactics, "law does not stand in one position," and law is "refracted" in the sense that "the development of law is not one of simple linear progress."[124]

> [T]he vision of law I have outlined is not one that is unified but *refracted*. . . . That is to say that law does not have one single appearance, it is different according to whether one refers to statute law, judge-made law, administrative law, the enforcement of law, and so on. It is also refracted in that it is frequently contradictory even at the level of statute. . . . The law is also refracted in the sense that it has different applications according to who attempts to use it. For example, migrant families using the "right to family life" against repressive governments which prevent such families from living together [is quite different from] individual men [using] the "right to family life" against individual women in order to defeat women's autonomy. . . . Finally law may have quite different effects depending on who is the subject of the law. Hence abortion laws may have different meanings for black or native women on whom abortions are pressed, than for white women who feel they can exercise "choice." So if law does not stand in one place, have one direc-

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123 CAROL SMART, *supra* note 115, at 163.

124 *Id.* at 97. Smart explains the concept of law as "refracted" through the example of law's relationship to women's bodies:

> The law does not have a completely unified policy in relation to women or women's bodies. Hence we have coexisting legislation in the UK which, on the one hand legalizes medical abortions, and on the other seeks to protect foetal life. Moreover, we can see that we have moved from a position where law simply acted punitively in relation to questions of bastardy or abortion, to a state of highly differentiated responses to new fields like adoption, *in vitro* fertilization, surrogacy, contraception, AIDS, and the rights of embryos. Some of these responses may appear more liberal than traditional legal strategies, but their power to intervene and inspect the private lives and lifestyles of women, should warn us against assuming that these modes are automatically less oppressive because they, for the most part, avoid criminal sanctions. Hence the term "refracted" is used to indicate that the development of law is not one of simple linear progress.

Id.

> tion, or have one consequence, it follows that we cannot develop one strategy or one policy in relation to it.[125]

Contract law, like all law, does not stand in one place. It is refracted in all of the ways identified by Smart: it is very different in its different forms, it is inconsistent even within a single form, it has different applications according to who attempts to use it, and it has quite different effects depending on who is the subject of the law. Contract theorists have studied the first two of these rather extensively. Scholars have examined the different manifestations of contract law in the statutes, judicial decisions, administrative regulations, and informal compliance systems.[126] Contradictions within contract law, particularly within judge-made law, have been extensively analyzed. Gilmore's discussion of the contradiction between bargained-for consideration and promissory estoppel is one example. It is not surprising that these efforts have given rise to and been influenced by several different and conflicting contract theories.

The third and fourth aspects of refraction in contract law have been less widely explored. While practitioners do know that the rules of contract law tend to have different applications depending on who uses them, and the phenomenon has been named by some feminist and critical race scholars, still this phenomenon has not been widely studied or theorized. This is somewhat surprising, considering the different applications evident in oft-studied pairs of cases such as *Kirksey v. Kirksey*[127] and *Langer v. Superior Steel Corp.*[128] (involving the requirement of bargained-for consideration); *Webb v. McGowin*[129] and *Harrington v. Taylor*[130] (involving promises for benefits received); *United Steel Workers of America, Local 1330 v. United States Steel Corp.*[131] and *State Bank of Standish v. Curry*[132] (involving promissory estoppel); and *Torres v. State Farm Fire & Casualty Co.*[133] and *A & M Produce Co. v. FMC Corp.*[134] (involving oral statements and the duty

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125 *Id.* at 164.

126 *See, e.g.*, Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977); G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198 (1988).

127 8 Ala. 131 (1845).

128 161 A. 571 (Pa. Super. Ct. 1932), *rev'd on other grounds*, 178 A. 490 (Pa. 1935).

129 168 So. 196 (Ala. Ct. App. 1935).

130 36 S.E.2d 227 (N.C. 1945).

131 492 F. Supp. 1 (N.D. Ohio 1980), *aff'd in part and vacated in part*, 631 F.2d 1264 (6th Cir. 1980).

132 500 N.W.2d 104 (Mich. 1993).

133 438 So. 2d 757 (Ala. 1983). Johnson v. State Farm Ins. Co., 587 So. 2d 974, 977 (Ala. 1991) cites *Torres* as implicitly overruled by Hickox v. Stover, 551 So. 2d 259 (Ala. 1989) on the application of a duty to read in consumer transactions.

134 186 Cal. Rptr. 114 (Cal. Ct. App. 1982).

to read).[135] Similarly, although lawyers know that the rules of contract law have very different consequences depending on who is subjected to its rules and students can see this when they think carefully about cases like *Acedo v. Department of Pub. Welfare*,[136] *Inman v. Clyde Hall Drilling Co.*,[137] *Lucy v. Zehmer*,[138] and *State v. Wheeler*,[139] there has not been sustained theoretical attention to the different consequences of legal rules for different groups of people. Questions familiar to critical work in other disciplines—"who benefits?" and "who is burdened?"—are yet to be asked of many of the rules and principles of contract law.

The relative lack of attention to these third and fourth aspects of law's refraction is significant because it helps to explain why contract theorists have given little attention to issues of oppression. Relational contract theory, thought by many to be the most expansive and productive of current approaches, does not provide tools for analysis of power created not by the contract itself, but by social positioning apart from the contract. Critical contract theory has looked at some aspects of the connection between contract and social positioning, but more work is needed.

In the United States, a person's social power is profoundly affected by her or his race, class, and gender positioning. Yet the individualist strand in contract ideology denies the significance of social position. Further, most contract theorists have ignored how application of the rules of contract law is affected by the social position of the person attempting to use the rules and how the consequences of a particular rule are affected by the position of the person who is subject to it. In this way, contract theories and the law that is informed by them have operated to justify or to conceal group-based oppression, including exploitation, marginalization, and powerlessness. We need new and different theories to focus and enable analysis of these aspects of contract. Moreover, as these parts of contract coexist with the genuine liberatory practices of choice, trust, interdependence, and the like, we must expect each theory to conflict with others we find valuable.

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135 Some of these pairings are featured in many contract law casebooks. *See, e.g.*, CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW (3d ed. 1993); EDWARD S. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW (4th ed. 1991).

136 513 P.2d 1350 (Ariz. Ct. App. 1973) (consequence of application of duty to read is loss of parental rights).

137 369 P.2d 498 (Alaska 1962) (consequence of application of rule requiring strict fulfillment of condition is that worker loses all rights under an employment contract).

138 84 S.E.2d 516 (Va. 1954) (consequence of application of rule that "objective" manifestation of assent is binding, regardless of actual intent is loss of the defendant's family farm).

139 631 P.2d 376 (Wash. 1981) (consequence of application of rule allowing offeror to revoke prior to acceptance is prosecutor can withdraw from plea bargain).

One way that contract thinking, with its featured notions of consent, choice, and control, has served to justify and to conceal oppression can be seen in the case of *Coolidge v. Pua'aiki and Kea*,[140] decided in 1877 by the American-controlled Supreme Court of the Kingdom of Hawai'i. This case demonstrates the role of contract thinking in the exploitation of hundreds of thousands of local and immigrant workers during the nineteenth and twentieth centuries.[141] The case involved two Hawai'ian workers caught fleeing a sugar plantation. During the 1870s, thousands of plantation workers were arrested for attempting to escape plantations, and most were returned with sentences of additional hard labor.[142] In *Coolidge*, Pua'aiki and Kea argued that the plantation owner ought not to be able to force their return; the court rejected their arguments, writing:

> The laborers signed the contract intelligently and there is no allegation made that either of the parties here has been sent to any place or subjected to any exposure which was not reasonably contemplated by themselves when they signed the contract. If they wished to confine themselves to any particular kind of labor, they should have themselves caused it to have been designated in their contract; so, likewise, if they had wished the space, over which they were to be sent, to have been specially limited, they should have caused it to be inserted in their contact.[143]

Translating the situation into the language of contract and refusing to acknowledge obligations, including obligations of respect, beyond the written form, plantation masters were able to deny responsibility to workers beyond the obligation to pay wages. Evoking contract law, the court affirmed this denial, going so far as to suggest that individual workers could have negotiated additional express terms in their labor contracts with the plantation masters.

While there is no surviving evidence regarding the conditions surrounding the making of Pua'aiki's and Kea's contracts, the general

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140 3 Haw. 810 (1877).

141 For information on the Hawai'ian sugar industry and the Supreme Court of the Kingdom of Hawai'i, see EDWARD D. BEECHERT, WORKING IN HAWAII: A LABOR HISTORY (1985); JON CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958); KATHERINE COMAN, THE HISTORY OF CONTRACT LABOR IN THE HAWAIIAN ISLANDS (1903); GAVAN DAWS, SHOAL OF TIME (1968); MICHI KODAMA-NISHIMOTO ET AL., HANAHANA: AN ORAL HISTORY ANTHOLOGY OF HAWAII'S WORKING PEOPLE (1984); RALPH KUYKENDALL, THE HAWAIIAN KINGDOM, 1778-1854 (1938); JOYCE C. LEBRA, WOMEN'S VOICES IN HAWAII (1991); ANDREW W. LIND, AN ISLAND COMMUNITY (1938); RONALD TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII 1835-1920 (1983); Karen N. Blondin, *A Case for Reparations for Native Hawai'ians*, 16 HAW. B.J. 13 (1981); Maivân Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawai'ian Commoner Rights in Land*, 64 WASH. L. REV. 233 (1989); Maivân Clech Lâm, *The Imposition of Anglo-American Land Tenure Law on Hawai'ians*, 23 J. PLURALISM & UNOFFICIAL L. 103 (1985).

142 *See* BEECHERT, *supra* note 141, at 40-57; TAKAKI, *supra* note 130, at 71-75.

143 *Coolidge*, 3 Haw. at 814.

practice of labor contracting by sugar planters in Hawai'i is well-known. Professor Ronald Takaki describes the practice regarding Chinese immigrant workers in 1870:

> After their arrival in the city, Chinese workers were herded into a labor market for assignment to the plantations. They were marched to a yard near the customhouse and guarded by soldiers. The planters and their agents inspected the laborers and made their selections. The Chinese laborers were then made to sign labor contracts that specified the period of service required, wages, board, housing, medical care, and other terms.[144]

Similar practices were used in the formation of labor contracts with Hawai'ian women and men, and with women and men from Portugal, Japan, Korea, the Philippines, and Puerto Rico.[145] Having signed the labor contracts, workers were paid menial wages, required to work seventy hours or more each week, given crowded living areas with little or no sanitation, provided little or no medical care, and subjected to harsh punishment for resistance.[146] By translating these arrangements into the language of contract, the court both justified and concealed the exploitation and powerlessness of these workers. While appearing to apply a simple rule of contract interpretation in an impartial fashion, the court refused to acknowledge any additional information beyond the badly translated contract document. Would the court have approached interpretation of an executive's contract in a similarly narrow fashion?

Other decisions, both old and new, have left lawyers with similar questions. Compare, for example, *Kirksey v. Kirksey*[147] and *Langer v. Superior Steel Corp.*[148]: why was the brother-in-law's promise viewed as gratuitous in *Kirksey*, while the company's promise in *Langer* was viewed as not gratuitous? If we see a distinction, does it rest on a gendered notion of value and desire reducible to the idea that Kirksey should not have expected to hold her brother-in-law to his word, while Langer should have expected to hold the company? For more recent

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144 TAKAKI, *supra* note 141, at 32.

145 Rates of pay for contract workers were set on the basis of race and gender. *Id.* at 77-78.

146 Of Masters and Servants, COMPILED LAWS OF THE HAWAIIAN KINGDOM ch. 30 (Honolulu: Hawaiian Gazette, 1884) (re-enactment of the Act of June 21st, 1850, "For the Government of Masters and Servants."). Section 1419 provided that any person who absents himself from service shall be ordered by the judge to work for two times the length of his absence after expiration of the original contract, up to one year. Section 1420 provided that if any person resists such an order he shall be put in prison, "there to remain, at hard labor, until he consents to serve according to law." This Section also provides for fines for repeat offenses. It is likely that this act was also written by Judge William Lee. *See* BEECHERT, *supra* note 141, at 41-42. Professor Beechert concludes: "By the end of Hawaiian independence, the contract labor law, despite frequent amendments designed to protect the rights of the worker, had evoked into a system of servitude." *Id.* at 57.

147 8 Ala. 131 (1845).

148 161 A. 571 (Pa. Super. Ct. 1932), *rev'd on other grounds*, 178 A. 490 (Pa. 1935).

cases, compare *United Steel Workers of America, Local 1330 v. United Steel Corp.*[149] and *State Bank of Standish v. Curry*.[150] In *Local 1330*, the court interpreted words of assurance from the plant manager to the steelworkers not to be promissory, while in *Bank of Standish*, very similar words by a bank officer to a commercial farmer were treated by the court as a promise. Surely there are several possible reasons to distinguish the cases, but is one very significant factor that middle-class people tend to think of the relationships between a factory owner and factory workers as adversarial, while they tend to think of the relationship between a bank and a farmer as cooperative? These class- and race-based assumptions are empirically dubious, but nevertheless lead courts to apply doctrines of contract interpretation in different ways according to the identity and social positioning of the people involved.[151]

Cases involving the duty to read provide other examples. Compare *Torres v. State Farm Fire & Casualty Co.*,[152] where the court imposed a duty to read on a purchaser of home insurance, with *A & M Produce v. FMC Corp.*,[153] where the court did not impose a duty to read on a commercial farmer. In cases involving nonmerchants or nonprofessionals, particularly those who are perceived by judges to be outsiders to the market, as are many men and women of color and white women, judges often seem drawn to use the rules of contract interpretation to educate the outsider to follow practices that are traditionally viewed as "good business practice," like reading the documents, writing out each term of the contract in detail, and keeping copies of important documents.[154] In cases involving commercial actors, in contrast, judges frequently are willing to defer to informal business practices, which often include not reading the documents, not writing out every term in detail, and not keeping copies. Indeed, U.C.C. § 2-207 is based on the assumption that businesspeople will

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149 492 F. Supp. 1 (N.D. Ohio), *aff'd in part and vacated in part*, 631 F.2d 1264 (6th Cir. 1980).

150 500 N.W.2d 104 (Mich. 1993).

151 *See also* Basch v. George Washington Univ., 370 A.2d 1364 (D.C. 1977) (holding that students should not have interpreted the university bulletin to include a commitment by the university); Rowe v. Montgomery Ward & Co., 473 N.W.2d 268 (Mich. 1991) (holding that Mary Rowe's employment contract with Montgomery Ward should not be interpreted to require cause for termination, even though the sales manager told Rowe at the time of hiring that she would have a job so long as she achieved her sales quota).

152 438 So.2d 757 (Ala. 1983). Johnson v. State Farm Ins. Co., 587 So.2d 974, 977 (Ala. 1991) cites *Torres* as implicitly overruled by Hickox v. Stover, 551 So.2d 259 (Ala. 1989) on the issue of application of the duty to read in consumer transactions.

153 186 Cal. Rptr. 114 (Cal. Ct. App. 1982).

154 *See also* St. Landry Loan Co. v. Avie, 147 So.2d 725 (La. Ct. App. 1962) (holding that Arthur Skinner, a black man who spoke French and not English, was liable on a note written in English despite evidence that he had been told by the Loan Company agent that the document would not make him personally liable).

not read the documents.[155] This dualism reflects a historical split between a view of contract law as imposing social control and a view of contract law as facilitating and supporting business practice. This split has tended to play out in the United States along lines of class, race, and gender.[156] In this and other ways, courts apply the rules of contract interpretation differently when the rules are evoked by persons in positions of relative powerlessness against persons with greater power, not because courts seek to hurt the weaker party, but rather because relationships between unequals appear to many judges to involve fewer expectations of trust, good faith, and the like.

Acedo v. Department of Public Welfare,[157] another duty to read case, demonstrates a second way in which contract thinking continues to justify and conceal group-based subordination. Herlinda Marie Acedo, an eighteen-year-old woman earning a low income, requested the Coconino County Department of Public Welfare to return her seven-month-old child, taken from her under an agreement that Acedo thought she could revoke at any time during a six month period. Acedo asked for her child's return less than three weeks after the infant had been taken from her. She expected to get her baby back, because the agency representative had told her that the adoption would not be final for six months and because before the child was born she had been allowed to revoke a similar consent to adoption.

The court denied Acedo's request, writing:

> It should be noted that the form gives unconditional consent to the placement of the child, and specifically states that the signer relinquishes all rights in the child. While the last paragraph of the form does speak in future terms, we are of the opinion that the form, taken as a whole, clearly indicates that the consent given is immediately effective. . . .
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> . . . .
>
> Here, by signing the consent form, petitioner, a high school graduate presumably of at least normal intelligence, manifested her intent to relinquish her parental rights in clear and unambiguous terms. When asked if she understood it, she replied in the affirmative.[158]

In support of its holding, the court cited to a line of cases involving the duty to read, under which a person who signs a document is deemed

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155 *See* U.C.C. § 2-207; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 28-31 (3d ed. 1988).

156 A similar split is evident in the history of the objective theory of contract interpretation. *See generally* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 294-314 (1994).

157 513 P.2d 1350 (Ariz. Ct. App. 1973) (consequence of application of duty to read is loss of parental rights).

158 *Id.* at 1353-54 (emphasis omitted).

to consent to every term contained therein.[159] This line of cases includes several construction contracts and a variety of other commercial and noncommercial cases.[160] Although the court in *Acedo* acknowledged that adoption is different from other contract situations, still the court applied the general duty to read rule. The rule is said to be justified as a way to encourage the salutary practice of reading what one signs and to protect any reliance by the other side, which was minimal in this case. Acedo's loss of her child was an onerous price to pay for the lesson. What is the value of being blind to the consequences of the duty to read rule applied in this case? Who benefits, and who is burdened?

In addition to denying or concealing the ways that social position influences the application of rules and the consequences of judicial decisions, contract thinking conceals harm to subordinated groups in another way. Contract thinking undermines efforts to improve the condition of those who have been exploited and otherwise oppressed by shifting responsibility from the actor to the victim. This dynamic can be seen in the struggles of residents of *colonias* in south Texas, where developers "sell" shacks without water, sewerage, or electricity under contracts requiring the payment of $100 or more per month for 100 years[161] or rent them for $250 a month or more. Approximately 340,000 people live in the 1436 impoverished *colonias* of south Texas; despite several years of effort and an array of arguably applicable health and commercial statutes, government officials have had little success in curbing the sales, rental, and commercial practices of *colonias* developers and landlords. Texas Attorney General Dan Morales charged that judges and other officials often are closely associated with *colonias* developers and tend to accept their practices as merely a part of normal business practice.[162] Many *colonias* residents rightly fear violence and other abusive collection tactics used by the developers and landlords. Families who default on their payments are forced off the land with little hope of legal defense, even when they have already paid thousands of dollars for the land. Even for those able to keep up with the monthly payments and the costs of trucking in water and other necessities, conditions of life in *colonias* are severe:

> The majority of all communicable diseases reported in Cameron County are believed to originate in about 60 colonias. Hundreds of miles to the

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159 *Id.* at 1353 (citing Hamer v. Hope Cottage Children's Bureau, Inc., 389 S.W.2d 123 (Tex. Civ. App. 1965), which in turn relies upon a line of duty to read cases).

160 *See, e.g.*, Gulf Oil Corp. v. Spence & Howe Constr. Co., 356 S.W.2d 382 (Tex. Civ. App. 1962), *aff'd*, 365 S.W.2d 631 (Tex. 1963); Indemnity Ins. Co. v. W.L. Macatee & Sons, 101 S.W.2d 553 (Tex. 1937), *cited in Hamer*, 389 S.W.2d, at 126.

161 Contract of Sale (on file with author).

162 *Editorial: Colonia Profiteering*, DALLAS MORNING NEWS, Mar. 22, 1995, at 24A.

> northwest, tuberculosis rates in El Paso County are twice the national average.
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> . . . By the time children in West Texas colonias reach 8 years of age, 35 percent have already experienced hepatitis A. By age 35, the rate is 95 percent.
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> . . . At the Del Mar Heights colonia near Brownsville, rainstorms turn silt, clay and salt into mud, while overflowing septic tanks spew forth raw sewage. Well water can be contaminated from such seepage, or from dirty water drained from tubs and sinks into yards. Storing drinking water invites contamination when lids are left open. Swarms of flies, mosquitoes and other insects thrive in such conditions. Severe rashes and insect bites on Colonia students obligated Brownsville Independent School District officials to send them home from school in 1984 and 1991.[163]

Of course, contract ideology is not the sole cause of the injustices suffered by *colonias* residents. It does, however, significantly burden efforts to improve conditions in these communities and to change the practice of *colonias* developers because it supplies an easy reason for disinterest by those outside the *colonias*: "People have chosen to live there. They want to own their own homes. No injustice can be done to one who consents." More contract theory is needed to challenge such easy dismissals.

There is yet another reason for more theory. Ironically, contract ideology has operated and continues to operate as liberatory and life enhancing. The idea that one may choose one's significant relationships and obligations has given hope to many and has inspired significant social change. In addition, contract has been a nursery for new or revived ideas in legal thought, able to support growth when other areas of law have become barren. Recent cases continue this practice, as contract law has generated new or refocused doctrine to supplement less generous areas of law. In *Reid v. Key Bank of Southern Maine, Inc.*,[164] for example, the jury found a breach of a contract where evidence suggested that the bank had racially discriminated against the Reids, but the record was not sufficient to satisfy the requirements for a violation of the Equal Credit Opportunity Act. Similarly in *Merk v. Jewel Food Stores*,[165] the Seventh Circuit used the parol evidence rule to protect individual employees against enforcement of a side agreement between their union and Jewel Foods that purported to undo their rights under a collective bargaining agreement. Even though the National Labor Relations Act has been interpreted not to prohibit such secret "side-agreements" and even though the written agreement would not normally be treated as integrated, the Seventh Circuit held that evidence regarding the secret agreement

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163 *Editorial: Las Colonias*, DALLAS MORNING NEWS, Oct. 16, 1994, at 2J.

164 821 F.2d 9 (1st Cir. 1987).

165 945 F.2d 889 (7th Cir. 1991).

should be excluded under the parol evidence rule because of its effect on the rights of individual employees.

Numerous other innovative contract law decisions address issues of oppression, some of which have been relatively long-lasting, like *Cutler Corp. v. Latshaw*,[166] which found a warrant of attorney and confession of judgment clause to be unconscionable and therefore unenforceable in a home remodeling contract. Other decisions have been more quickly struck down, such as *Monge v. Beebe Rubber Co.*,[167] which held that sexual and racial harassment is a breach of a contractual obligation of good faith.[168]

Robert Gordon writes of "an underground jurisprudence of equity" from which innovative ideas about contract are drawn.[169] This is a nice image. Cyborgs want more. Judge Cardozo contributed much generative thought: "We are not to suppose that one party was to be placed at the mercy of the other";[170] "From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention."[171] Cyborgs want more. Cyborgs want images of the complex push-pull of contract thinking, of the ways in which contract both oppresses and liberates, in which it is both crucial to society and destructive of it. In irony and blasphemy, cyborgs see themselves; in refracted wholes, cyborgs see the world.

Assuming that concerns of strategy and substance lead us to seek numerous conflicting contract theories and to look especially at the interaction between contract and systems of power existing apart from contract, I would like to suggest two areas for development of contract theory following work already begun by writers in other disciplines. Cyborg eclecticism: Wired to machines invented by crowds, generations born of African mathematicians, inventors of the zero, cyborgs fix their gaze through the eyes of others.

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166 97 A.2d 234 (Pa. 1953). Many state statutes now prohibit warrant of attorney and confession of judgment clauses in consumer contracts.

167 316 A.2d 549 (N.H. 1974). In Howard v. Dorr Woolen Co., 414 A.2d 1273 (N.H. 1980) the court reinterpreted *Monge* as a "public policy" exception to an employer power to terminate an at-will employee.

168 *But see* Cris Carmody, *Partner Can Sue for Age, Sex Bias on Contract Theory, Judge Holds*, CHI. DAILY L. BULL., Aug. 21, 1992, at 1 (reporting decision allowing breach of contract action based on allegations of age and gender bias).

169 Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); *cf.* Deborah Waire Post, *Profit, Progress and Moral Imperatives*, 9 TOURO L. REV. 487 (1993) (reviewing MEIR TAMARI, IN THE MARKETPLACE: JEWISH BUSINESS ETHICS (1991).

170 Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

171 Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921).

IV. Equal Exchange Theory

Many contracts teachers have attempted the difficult task of developing, within the language of contract, an argument that merchants or landlords, doctors or lawyers, ought not to charge the poor more. We stand before incredulous classes, some students staring in disbelief, some sneering in disrespect. Many of us give up, shrugging against counter-arguments about risks of theft and credit-worthlessness. Sure, some merchants and landlords charge more even beyond their actual expenses and risks, but what can be said? Perhaps religion or morality sets a limit on the size of profit a person might justly extract from those subordinated by race, gender, class, or disability, but contract law has little to offer beyond the gasping doctrine of "substantive unconscionability." These are moments when familiar contract theories fail us.

Equal Exchange, Inc. is a U.S. company that purchases coffee directly from Third World farming cooperatives. One of many alternative trading organizations (ATOs) now operating throughout the world, Equal Exchange recognizes the injustice to farmers of international market practices and pays above-market prices:

> By setting up direct trading relationships with coffee-farming co-ops, ATOs can pay farmers a fair price: a price that covers the costs of production, a price that guarantees farmers a living wage for their labor. . . .
>
> . . . .
>
> Between 1989 and 1993, Equal Exchange . . . paid $750,000 in above-market premiums to small farmers' cooperatives. That's 376% of the company's pre-tax profits over that period of time. For the co-ops Equal Exchange trade with, that's almost double what they would have received on the open market.[172]

The purchasing practices of Equal Exchange and other alternative trading organizations enacts an alternative theory of contractual exchange.

James Alan McPherson's short story *A Loaf of Bread*[173] develops equal exchange theory, exploring exchange as constitutive of social order, in a world marked by domination. The story involves Harold Green, a white grocer who owns three stores. Like some contemporary merchants, he charges significantly more at his store in the Afri-

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[172] Making Coffee Strong: Equal Exchange-Alternative Trading in a Conventional World 7-8 (1995) (brochure, on file with author). The founders of Equal Exchange, Inc. are Rink Dickinson, Jonathan Rosenthal, and Michael Rozyne. I am grateful to Carol Coston, Executive Director of the Partners for the Common Good Loan Fund, and Elise García, St. Mary's University School of Law Director of Communications and Development, for introducing me to Equal Exchange.

[173] James Alan McPherson, *A Loaf of Bread*, *in* Terry McMillian, Breaking Ice: An Anthology of Contemporary African-American Fiction 466 (1990).

can-American neighborhood than at his store in either the wealthy white neighborhood or the poor white neighborhood:

> It was one of those obscene situations, pedestrian to most people, but invested with meaning for a few poor folk whose lives are usually spent outside the imaginations of their fellow citizens. A grocer named Harold Green was caught red-handed selling to one group of people the very same goods he sold at lower prices at similar outlets in better neighborhoods. He had been doing this for many years, and at first he could not understand the outrage heaped upon him. He acted only from habit, he insisted, and had nothing against the people whom he served.[174]

Nelson Reed, an assembly-line worker and deacon in the Baptist church, uncovered Harold's pricing practices, helped to organize a picket at the store, and contacted the local television station. Harold's children watched the news report and the next day, were targeted by pickets at their school. Ruth Green insisted that Harold act in response to the complaints: " 'One day this week,' she told her husband, 'you will give free, for eight hours, anything your customers come in to buy.' "[175] Ruth punctuated her request with a threat: " '[i]f you refuse, you have seen the last of your children and myself.' "[176] Still Harold resisted.

Nelson, for his part, was transformed by exercise of the power of organized protest, and his wife, Betty, a thoughtful, complicated, woman,[177] became deeply troubled:

> All his life he had trusted in God and gotten along. But now something in him capitulated to the reality that came suddenly into focus. "I was wrong," he told people who called him. "The onliest thing that matters in this world is *money*. And when was the last time you seen a picture of Jesus on a dollar bill?" This line, which he repeated over and over, caused a few people to laugh nervously, but not without some affirmation that this was indeed the way things were. Many said they had known it all along. Others argued that although it was certainly true, it was one thing to live without money and quite another to live without faith. But still most callers laughed and said, "You right. You *know* I

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174 *Id.*

175 *Id.* at 467.

176 *Id.*

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> Brought to the church after a number of years of living openly with a jazz musician, she had embraced religion when she married Nelson Reed. But though she no longer believed completely in the world, she nonetheless had not fully embraced God. There was something in the nature of Christ's swift rise that had always bothered her, and something in the blood and vengeance of the Old Testament that was mellowing and refreshing. But she had never communicated these thoughts to anyone, especially her husband. Instead she smiled vacantly while others professed leaps of faith, remained silent when friends spoke fiercely of their convictions. The presence of this vacuum in her contributed to her personal mystery; people said she was beautiful, although she was not outwardly so. Perhaps it was because she wished to protect this inner beauty that she did not smile now, and looked extremely sad, listening to her husband on the telephone.

Id. at 469.

know you right. Ain't it the truth, though?" Only a few people, among them Nelson Reed's wife, said nothing and looked very sad.[178]

Seeing her husband's new materialism, Betty withdrew from the project.

Harold, meanwhile, sought advice from his brother-in-law, an insurance salesman named Thomas, who suggested alternative strategies:

> "So," Thomas answered, "You must fight to show these people the reality of both your situation and theirs. How would it be if you visited one of their meetings and chalked out, on a blackboard, the dollars and cents of your operation? Explain your overhead, your security fees, all the additional expenses. If you treat them with respect, they might understand."
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> Green frowned. "That will never do," he said. "It would be an admission of a certain guilt."[179]

Still, Harold sensed the need to explain himself to the protestors. Instead of a public presentation, Harold decided to meet privately with Nelson Reed. And he began preparing for the meeting:

> [T]he grocer resigned himself to explain to Reed, in as finite detail as possible, the economic structure of his operation. He vowed to suppress no information. He would explain everything: inventories, markups, sale items, inflation, balance sheets, specialty items, overhead, and that mysterious item called profit. This last item, promising to be the most difficult to explain, Green and his brother-in-law debated over for several hours. They agreed first of all that a man should not work for free, then they agreed that it was unethical to ruthlessly exploit. From these parameters, they staked out an area between fifteen and forty percent, and agreed that some place between these two borders lay an amount of return that could be called fair.[180]

Thomas pushed Harold to explain why it was that he felt justified in earning a higher profit from his store in the African-American neigh-

178 *Id.* at 468.
179 *Id.* at 473.
180 *Id.*

borhood.[181] Harold struggled for an answer, but found none satisfactory.[182]

In the meeting between Nelson and Harold, talk again focused on exchange and profit: "The grocer pulled two gray ledgers from his briefcase. 'You have for years come into my place,' he told the man. 'In my memory I have always treated you well. Now our relationship has come to this.' "[183]

" 'All I know,' " Nelson replied, " 'is over at your place a can of soup cost me fifty-five cents, and two miles away at your other store for white folks, you chargin' thirty-nine cents.' He said this with the calm authority of an outraged soul." " 'Man, why you want to *do* people that way?' he asked. 'We human, same as you.' "[184]

Harold tried to explain:

> I'll tell you what is in these books . . . In one place, in the area you call white, I get by barely by smiling lustily at old ladies, stocking gourmet food on the chance I will build a reputation as a quality store. The two clerks there cheat me; there is nothing I can do. . . . The second place is on the other side of town, in a neighborhood as poor as this one. . . . I use the loss there as a write-off.
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> . . . In this area I will admit I make a profit, but it is not so much as you think. But I do not make a profit here because the people are black. I make a profit because a profit is here to be made. . . .[185]

Nelson agreed that Harold had a "right" to make a profit, yet he insisted that Harold was wrong to take higher profits from this store.

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'Here is a case that will point out an analogy,' he said, licking a cigarillo. 'I read in the papers that a family want to sell an electric stove. I call the home and the man says fifty dollars. I ask to come out and inspect the merchandise. When I arrive I see they are poor, have already bought a new stove that is connected, and are selling the old one for fifty dollars because they want it out of the place. The electric stove is in good condition, worth much more than fifty. But because I see what I see I offer forty-five.'

. . . .

'The man agrees to take forty-five dollars, saying he has had no other calls. I look at the stove again and see a spot of rust. I say I will give him forty dollars. He agrees to this, on condition that I myself haul it away. I say I will haul it away if he comes down to thirty. You, of course, see where I am going.'

The grocer nodded. 'The circumstances of his situation, his need to get rid of the stove quickly, placed him in a position where he has little room to bargain?'

'Yes,' Thomas answered. 'So? Is it ethical, Harry?'

Harold Green frowned. He had never liked his brother-in-law, and now he thought the insurance agent was being crafty.

Id. at 473-74.

182 Harold argued that the buyer's behavior was ethical: "[T]his man does not *have* to sell! It is his choice whether to wait for other calls." "It is the right of the buyer to get what he wants at the lowest price possible. That is the rule. That has *always* been the rule." "Now you see,"" he continued, "Much more than a few dollars is at stake. If this one buyer is to be condemned, then so are most people in the history of the world. . . . This code will be here tomorrow, long after the ones who do not honor it are not." *Id.* at 474.

183 *Id.*

184 *Id.* at 475.

185 *Id.*

Harold asked for Nelson's sympathy: " 'Place yourself in *my* situation . . . Say on a profit scale from fifteen to forty percent, at what point in between would you draw the line?' " Nelson said he would charge closer to fifteen than forty. " 'How close?' " Harold retorted. " 'In church you tithe ten percent.' 'In restaurants you tip fifteen.' . . . 'Over fifteen.' 'How much over?' . . . 'Twenty, thirty, thirty-five?' " Harold taunted Nelson now, chanting percentages. Nelson finally broke: " 'Damn *this*!' "[186]

> "I ain't *you*, . . . All I is is a poor man that works *too* hard to see his pay slip through his fingers like rainwater." . . . "My daddy sharecropped down in Mississippi and bought at the company store. He owed them twenty-three years when he died. I paid off five of them years and then ran away to up here. . . . Now come to find out, after all my runnin', they done lift that *same company store* up out of Mississippi and slip it down on us here! Well my daddy was a *fighter*, and if he hadn't owed all them years he would raise some hell. Me, I'm steady my daddy's child, plus I got seniority in my union. I'm a free man. Buddy, don't you know *I'm gonna raise me some hell*!"[187]

That night, Ruth again tried to convince Harold to hold the give-away and he continued to resist, " 'I *will not* do it!' " " 'Of course you'll do it,' " she replied. " 'Because at heart you are a moral man.' " " 'If I am, why should I have to prove it to them.' " " 'Not them,' " Ruth responded, " 'For yourself, Harry. For the love that lives inside your heart.' "[188]

Meanwhile, Nelson steamed with anger, incensed that Harold had asked for his sympathy (" 'Hell, I can't even *afford* the kind of shoes he wears.' ") and berated himself and his wife with the fact of his poverty (" 'I have work all my life for other folks and I don't even own the house I live in. . . . [D]on't you think I'm a fool.' "). This was a politics of envy and self-degradation that Betty refused to join; she listened quietly as he called others to plan the next day's picket: "[o]n several occasions, hearing him declare himself a fool, she pressed the pillow against her eyes and cried."[189]

Determined to maintain business as usual, Harold opened the store and prepared for a quiet day. The first customer was Betty Reed; she selected a loaf of bread and placed a dollar on the counter. For reasons he did not comprehend, Harold was moved by her friendly manner. " 'Free,' " he told her. She tried again to pay for the bread, but Harold pushed the money back to her. Some time later a little girl came into the store, wanting to buy some candy. " 'Free,' " Harold said, cheerfully now.[190]

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186 *Id.* at 476.
187 *Id.*
188 *Id.*
189 *Id.* at 478.
190 *Id.* at 479.

When the pickets arrived, Harold put a sign in the store window announcing simply " 'FREE.' " The crowd outside was confused. Slowly Nelson Reed entered the store; others followed. Harold shouted, " '*All free*!' " People began grabbing things from the shelves. Nelson left empty-handed, while the others loaded up with food and other items.[191]

Within an hour, the store was empty, and Harold sought to calm his mind. Nelson appeared at the door. " 'All gone,' Harold said, 'My friend, Mr. Reed, there is no more.' "[192]

> "Mr. Green," Nelson Reed said coldly. "My wife bought a loaf of bread in here this mornin'. She forgot to pay you. I, myself, have come here to pay you your money."
>
> "Oh," the grocer said.
>
> . . . .
>
> He rang the register with the most casual movement of his finger. The register read fifty-five cents.
>
> Nelson Reed held out a dollar.
>
> "And two cents tax," the grocer said.
>
> The man held out a dollar.
>
> "After all," Harold Green said. "We are all, after all, Mr. Reed, in debt to the government."
>
> He rang the register again. It read fifty-seven cents.
>
> Nelson Reed held out a dollar.[193]

Many readers conclude that fifty-five cents was a fair price for the loaf of bread, that it is the price charged at Harold's other stores. It might be a bit higher because of added security costs, or perhaps a bit lower, reflecting lower rent, but surely the profit is somewhere closer to fifteen than forty.[194]

This story locates market transactions within a complex social world. It is contract theory pushing beyond current substantive unconscionability, beyond medieval just-price doctrine. There is a profit to be made by charging more in low-income African-American neighborhoods because white racism creates and maintains commercial boundaries.[195] Geographical distance, inadequate transportation services, racial and sexual harassment, and systematic violence restrict alternatives available to black consumers. The profit is there to be made because of race, class, and gender subordination.[196]

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191 *Id.* at 480-81.

192 *Id.* at 481.

193 *Id.* at 482.

194 Following the suggestion of Deborah Waire Post, I use this story as part of the assigned reading in my contracts class. *See* HOM, KASTELY & POST, CONTRACTING LAW: A SET OF COURSE MATERIALS (forthcoming 1996).

195 *See generally* Austin, *A Nation of Thieves*, *supra* note 44.

196 *See* articles cited *supra* note 44.

In *A Loaf of Bread*, exchange is foundational to human society; people who live in the neighborhood need Harold Green's store and he needs them. These needs are material, social, and political: they are for food, money, individual dignity, and human connection. Contract is a device through which these needs can be satisfied and through which social connection can be maintained. Contract is also a serious threat to human society. Contract can aggravate inequalities caused by violence, exploitation, racism, and patriarchy. Contract that exploits, marginalizes, or renders some powerless to affect important conditions of their lives reduces human society, undermining the possibility of human connection. Contract constitutes society only as it is other-regarding as well as self-interested. McPherson's story is a work of ironic contract theory.

Some readers will dismiss the possibility of equal exchange presented in *A Loaf of Bread* as idealistic and naive, insisting that self-interest is "real" and respect between unequals "unreal." Others will think, with Professor Richard Epstein, that "freedom of contract" ought not be "restrained" by concerns of justice either because market transactions are almost always just and the occasions of injustice are too few to warrant the costs of attention or because injustice is too complex to be addressed through contract law.[197] These responses raise questions about how "reality" is constituted and how "justice" is conceived. For what purpose is it beneficial to conceive of people as autonomous, rational, and self-interested, and what are the costs of this view? Who benefits and who is burdened by naming "self-interested" exchange as "natural" and deviations from that, including variations caused by concern for others, "artificial" or "external?" Who benefits and who is burdened by an understanding of "the market" as amoral? These questions illuminate an important aspect of contract theorizing, involving perceptions of social reality. While some have characterized the differences among contract theories according to what values, "policies," or politics each features,[198] it is also useful to note differences in "background assumptions" about human life and social connection reflected in different theories. In this aspect, different contract theories appear not only richly diverse, but deeply conflicted. They cannot be reconciled into a comfortable celebration of "complexity" or "difference."[199] Just contract law requires irony, the ability to hold "incompatible things together because both or all are

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197 *See* Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 305-15 (1975).

198 *See, e.g.*, Farnsworth, *supra* note 105 (bemoaning theory); Feinman, *The Significance of Contract Theory*, *supra* note 12 (featuring different politics of different theories); Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988) (offering reconciliation).

199 Compare SMART, *supra* note 112, at 164-65:

> [I]t is law's power to define and disqualify which should become the focus of feminist strategy rather than law reform as such. . . . Law cannot be ignored precisely because of its

necessary and true."[200] Work on equal exchange theory offers one possibility of ironic contract theory.

V. Consent Theory

Contemporary work on consent provides another area for development of contract theory. There is now a rich interdisciplinary literature that interrogates modern notions of consent and their relevance to issues of justice. In law, the phrase *volenti non fit injuria* was claimed, coined, or created by nineteenth-century legal theorists. It is a Latin phrase that has been given much greater significance in Anglo-American law than it ever had in Roman law: given life in translation, it means "no injustice can be done to him who consents."[201] Following this idea, much emphasis is put on whether or not a person has consented to the behavior or arrangement involved. The assumption that consent would legitimate the behavior is seldom interrogated. This pattern is evident in contract law and also in popular political debate. It has been featured in discussion of consensual relationships between college professors and students.[202] Some have argued that sexual relationships between professors and adult students should be respected, that schools should not condemn such relationships, because to do so would be to treat students as incompetent. Others have argued that recognition of differences in power, particularly if the student is a woman and the professor a man, requires a school to assume that the student was not capable of reasoned consent. Thus, the choice seems to be between honoring the student by approving the relationship or disrespecting the student by prohibiting the relationship. This is where familiar contract theory fails us. We need a third alternative. We need better tools to analyze interconnections among consent, power, and justice.

Professor Deniz Kandiyoti, a sociologist, coined the term "patriarchal bargain" to describe the context of women's actions under different patriarchal systems: "I will argue that women strategize within a set of concrete constraints that reveal and define the blueprint of

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power to define, but feminism's strategy should be focused on this power rather than on constructing legal policies which only legitimate the legal forum and the form of law.

See also Bruce Lincoln, Discourse and the Creation of Society (1989) (on the ways that discourse constructs and reconstructs society); Mario Varga Llosa, The Storyteller 93 (1989) (on the importance of naming and story-telling to the creation and maintenance of society).

200 Haraway, *supra* note 47.

201 Terence Ingman, *History of the Defence of* Volenti Non Fit Injuria, 26 Jurid. Rev. 1 (1980); A.J.E. Jaffey, *Volenti Non Fit Injuria*, 44 Cambridge L.J. 87 (1985).

202 *See, e.g.*, DeNeen L. Brown, *U-Va. May Limit Faculty-Student Sex Liaisons*, Wash. Post, Mar. 25, 1993, at B1; Dan Froomkin, *Professor's Group Seeks the Right to Sleep with Consenting Students*, Seattle Times, July 24, 1994, at A14; Bob Sipchen, *A Lesson in Love?*, L.A. Times, Sept. 16, 1994, at E1.

what I will term the *patriarchal bargain* of any given society, which may exhibit variations according to class, caste, and ethnicity."[203] By tying the content of women's choices to the nature of patriarchy, rather than to the capacity or incapacity of women's judgment, Kandiyoti offers a useful tool for contract theory. Her approach in effect reverses the idea that consent justifies behavior, assuming instead that the behavior must be examined first, before one can understand the meaning of consent.[204]

Professor Judith Lorber, a health care expert, has used Kandiyoti's notion of a patriarchal bargain to analyze women's consent to the relatively invasive procedure of *in vitro* fertilization in cases of male infertility.[205] "Although in vitro fertilization was originally developed to bypass blocked or missing Fallopian tubes, it is now also the treatment of choice in cases of male infertility due to low sperm count, poor sperm motility, or badly shaped sperm." Under this procedure, a woman must undergo hormonal stimulation, sonagrams, and intravaginal or intra-abdominal procedures, often under general anesthesia. Numerous authors have questioned the validity of this procedure, comparing the high emotional and financial costs to women and the relatively low rates of live births.[206] Lorber looks closely at the contexts in which women are asked to consent to

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203 Deniz Kandiyoti, *Bargaining with Patriarchy*, 2 GENDER & SOC'Y 274, 275 (1988).

204 In addition, Kandiyoti's theory assumes that bargaining is done by women from positions of relative powerlessness, and this assumption also helps one separate the terms of the agreement from the quality or rationality of women's consent. Kandiyoti's use of the word "bargain" in this context is itself a conscious critique of dominant Anglo-American contract thinking. She explains:

> Like all terms coined to convey a complex concept, the term *patriarchal bargain* represents a difficult compromise. It is intended to indicate the existence of set rules and scripts regulating gender relations, to which both genders accommodate and acquiesce, yet which may nonetheless be contested, redefined, and renegotiated. Some suggested alternatives were the terms *contract, deal, or scenario*; however, none of these fully captured the fluidity and tension implied by bargain. I [know] . . . that the term *bargain* commonly denotes a deal between more or less equal participants, so it does not accurately apply to my usages, which clearly indicates an asymmetrical exchange. However, women as a rule bargain from a weaker condition.

Id. at 286 n.1. Perhaps, this passage suggests, a contract theory that assumes relative equality is incapable of recognizing gender hierarchy; perhaps such a theory will fail to develop a complex understanding of women's consent and the consent of subordinated men. An alternative theory is needed.

205 Judith Lorber, *Choice, Gift, or Patriarchal Bargain? Women's Consent to* In Vitro *Fertilization in Male Infertility*, 4 HYPATIA 23 (1989).

206 Among the studies cited by Lorber are E.H. BARUCH ET AL., EMBRYOS, ETHICS, AND WOMEN'S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES (1988); G. COREA ET AL., HOW NEW REPRODUCTIVE TECHNOLOGIES AFFECT WOMEN (1987); C. OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS (1987); B. KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989); P. SPALLONE & D.L. STEINBERG, MADE TO ORDER: THE MYTH OF REPRODUCTIVE AND GENETIC PROGRESS (1988); and M. STANWORTH, REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD, AND MEDICINE (1987).

in vitro fertilization and compares these to circumstances in which men and women are asked to consent to kidney donation.[207] Using the concept of patriarchal bargain, Lorber questions the justice of *in vitro* fertilization as treatment for male infertility. Lorber argues that the two reasons women most frequently give for their agreement to this procedure—that she wants her partner's biological child or that she altruistically wants to give him a chance to have a biological child—can be understood only after examining the medical system's treatment of her interest as coextensive with his, the subordinate status of women in marriage, and the social practice of assigning responsibility for childlessness to women. These limitations on women's choices, Lorber argues, are unjust, regardless of individual women's consent.

Professor David A. Gerber, a social historian, challenges notions of consent employed in historical analysis of "freak" shows.[208] Gerber asks, "If an individual consents, by virtue of what appear to be acts of free choice, to being degraded, exploited, or oppressed, does that act of consent end the moral problem that his or her situation seems to constitute?" He interrogates the now popular construction of Otis "the Frogman" Jordan (the African-American man with deficient, poorly functioning limbs who appeared at the 1984 New York State Fair), Charles Sherwood Stratton (the working class boy whom P.T. Barnum promoted as Tom Thumb), and others as "entertainers" and "performers" who unproblematically chose their "careers."

> For centuries people with visible physical anomalies . . . have consented to display these anomalies in public and for money. How are we to evaluate the quality of that consent—especially in light of the extent to which people with physical anomalies have experienced broad and abiding social oppression and marginalization? By what criteria may we judge that consent fictive or credible? Under any circumstance, should that consent necessarily have any weight at all in reaching a judgment about the morality of such a display?[209]

Drawing on Don Herzog's *Happy Slaves*,[210] Gerber develops a set of "significant preconditions" for effective choice and consent, which include the existence of alternatives, a social environment that allows an individual to play a variety of different roles, "occasions for choice"—times when one may exercise independent agency, physical and mental capacity to affect choices, information about alternatives, and sufficient time and physical and mental security to allow evaluation of options. Gerber also elaborates a set of "cautions," or guidelines, for

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207 Lorber chose this area because there have been extensive studies of consent for kidney donation. Lorber, *supra* note 185, at 24.

208 David A. Gerber, *Volition and Valorization in the Analysis of the 'Careers' of People Exhibited in Freak Shows*, 7 DISABILITY, HANDICAP & SOC'Y 53 (1992).

209 *Id.*

210 DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

interpretation of individual choices: (1) one cannot necessarily infer consciousness from behavior—apparently voluntary choices may be the products of volition, but also of apathy, or lack of alternatives; (2) one ought not to assume that a person who appears to be content with a bad situation consents to that situation—"[s]he may not understand her situation, let alone how she came to it, or she may lack the motivation to change a situation she knows to be bad"; and (3) one ought not to assume that because a person has made a choice, she has chosen all of the consequences that flow from that choice—"there may be unintended and often undesired consequences from any course of action, which we would not choose if they were presented to us individually, as part of a single set of options."[211]

Using these guidelines, Gerber argues that "the complex acts by which those displayed [in "freak" shows] may be said to have consented to their situation considerably strain our understanding of consent." Regarding Charles Stratton ("Tom Thumb"), for example, Gerber concludes that Stratton was a "tragic" figure, "a prisoner of conditions over which he, as a dwarf, had little control and which both profited and humiliated him."[212] Yet this understanding of consent must be ironic: to see Stratton as a victim of severe injustice is not to deny that Stratton was also a "mature man with the intellectual resources to see that much of his life was a masquerade."[213] At times, contract thinking has posed a rigid dichotomy between incapacity and competence, as if every situation must fit into one or the other: either the person was competent, and her consent is "respected," or she was incapable, and her consent is disregarded. In a contract theory about power, though, the focus should not be on the person's capacity, but rather on the use or abuse of power by others. To say P.T. Barnum unjustly exploited Charles Stratton is not to judge Stratton's individual capacities.

In a different but related project, Professor Carl Gutiérrez-Jones, a literary critic, identifies a Chicana critique of consent in the work of Anna Castillo[214] and Cherríe Moraga.[215] "The artists explored here repeatedly ask to what extent Mexicanas and Chicanas have 'free' choices in either the colonial or contemporary contexts. Their approaches suggest that consent, as figured in the great wealth of legal-cultural material surrounding us, remains an essentially symbolic

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211 Gerber, *supra* note 188, at 57.

212 *Id.* at 67.

213 *Id.*

214 ANA CASTILLO, THE MIXQUIAHUALA LETTERS (1986); Ana Castillo, *An Idyll, in* WOMEN ARE NOT ROSES (1984); Ana Castillo, *In My Country, in* MY FATHER WAS A TOLTEC (1988).

215 CHERRÍE MORAGA, GIVING UP THE GHOST (1986).

power denied in practice."[216] In Chicano culture, Gutiérrez-Jones argues, shame is used "to reinforce Chicana gender roles . . . by associating Chicana violation with an act of consent." The merging of consent and violation, of consent and force, challenges the easy and misleading distinction between consent and coercion in Anglo-American political thought and invites deeper consideration of the meanings of consent and power among us.

These and other writings on consent offer useful ways to understand issues of power, consent, and justice. They invite contract theorizing that moves beyond the reductive dualism of consent and nonconsent.

It is better to think of ourselves as cyborgs than as cogs. And for lawyers and judges working with conflicted and complex contract law, cyborg thought offers the possibility of multiple, generative contract theories that can help us to understand, challenge, recreate, or tolerate each disparate piece of the ironic whole of contract. As lawyers we need an attitude toward contract theories and contract theorizing that will accept inconsistency and value contract theorizing as an ongoing activity. This is cyborgian meta-theory.

216 CARL GUTIÉRREZ-JONES, RETHINKING THE BORDERLANDS: BETWEEN CHICANO CULTURE AND LEGAL DISCOURSE 110 (1995).